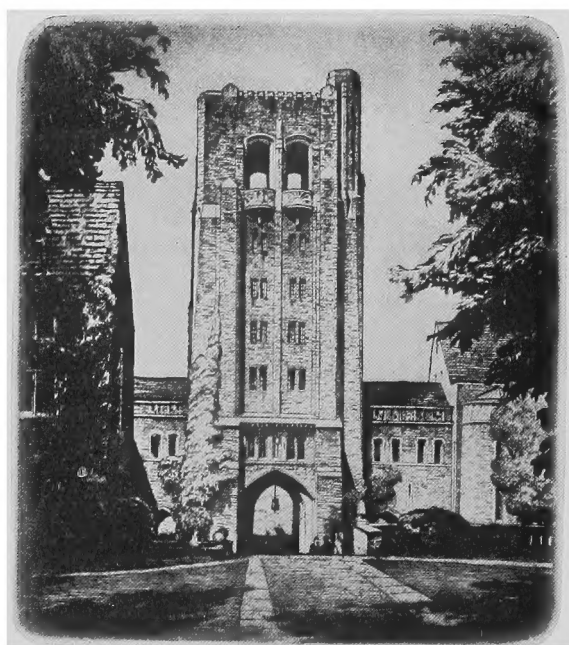


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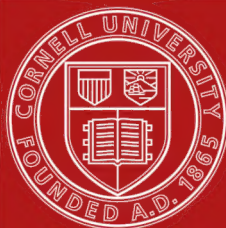
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NEW YORK

BAR EXAMINATION

QUESTIONS AND ANSWERS

BY
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OF THE NEW YORK BAR

AND
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OF THE NEW YORK BAR

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PREFACE

This third edition has been carefully revised and brought down to date. Many new questions have been added in every branch of the law. All the latest decisions and statutes have been noted wherever necessary. The New York Canons of Ethics have also been added to this edition. The book has been divided into two parts, Substantive Law, and Pleading, Practice and Evidence. The student will find this a more convenient method of review. In conclusion, this work is submitted in the confident belief that it will be found to furnish that preparation which is needed to insure success in passing the final examinations.

JOSEPH JACOBS,
LOUIS APPLEBOME.

NEW YORK, January 20th, 1916.

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NEW YORK BAR EXAMINATION

QUESTIONS AND ANSWERS

SUBSTANTIVE LAW

CHAPTER I

Agency

Q. A, an infant, is the owner of a certain piece of land. He authorizes B, an adult, to sell said land. B conveys the same to C. After A became of age, it is claimed that he ratified the conveyance. A sues in ejectment. Can he recover?

A. Judgment for A. The question here is, can an infant after arriving at age ratify the act of his agent performed while he was an infant? This depends upon whether his appointment of an agent is a void or voidable act. If the former, it cannot be ratified; if the latter, it can be. In New York the doctrine is laid down, that the only act an infant is incapable of performing as to contracts is the appointment of an agent or attorney. Whether the doctrine is founded upon solid reasons may be doubted, but there is no doubt that it is law. *Fonda v. Van Horn*, 15 Wend. 631.

Q. A appoints B, an infant, as his agent to sell certain goods. B sells the goods to C. A afterwards seeks to disaffirm the sale, and brings action to recover back the goods on the ground that B's act was void, as an infant cannot be an agent. Judgment for whom and why?

A. Judgment for C. "It is by no means necessary for a person to be *sui juris*, or capable of acting in his or her own right, in order to qualify himself or herself to act for others."

Story's Agency, secs. 6, 7, 9. It is the undoubted law of agency, that a person may do through another what he could do himself in reference to his own business and his own property, because the agent is but the principal acting in another name. This is axiomatic and fundamental. *Qui facit per alium facit per se*. Story's Agency, sec. 440.

Q. In an action by A against B, the wife of C, to recover for the repairs done to a building belonging to B, it appeared that C, the husband, went to A and stated that his wife wanted the repairs done to the said building. A accordingly made the repairs of the value of \$300, which B, the wife, refused to pay, stating that she never authorized her husband to order the said repairs. Conceding the facts as stated, who should have judgment and why?

A. Judgment for B, the wife. There is no presumption that the husband is the agent of the wife from the mere fact of the marital relation. In order to create a liability against the wife, there must be some proof of an actual authority or the wife's ratification of any contract that he may make regarding her property. *Aarons v. Klein*, 29 Misc. 639.

Q. A sends B, his servant, with a horse of A's to C with instructions to sell the horse to C for \$500 but in no case to take any money from C. B sells the horse to C for \$400 and makes away with the money. C knows nothing of the instructions to B. What are the rights of A against C? State your reasons.

A. A has no rights. "Where private instructions are given to a general or special agent respecting the mode and manner of executing the agency, intended to be kept secret and not communicated to those with whom he may deal, such instructions are not to be regarded as limitations upon his authority, and notwithstanding he disregards them, his act, if otherwise within the scope of his agency, will be valid and bind his employer." *Edwards v. Dooley*, 120 N. Y. 540.

Q. A was the freight agent of the defendant corporation, and his duty and authority was to receive and forward freight over the defendant's road, giving a bill of lading therefor. He issued bills of lading for goods to B, although no goods were shipped by B or delivered to the defendant. B transferred the bills of lading to C who had no notice. C sues the defendant. Can he recover?

A. Yes. "It is a settled doctrine of the law of agency in this state, that where the principal has clothed his agent with power to do an act upon the existence of some extrinsic fact necessarily and peculiarly within the knowledge of the agent, and of the existence of which the act of executing the power is itself a representation, a third person dealing with such agent in entire good faith pursuant to the apparent power, may rely upon the representation, and the principal is estopped from denying its truth to his prejudice." Finch, J., in *Bank of Batavia v. R. R.*, 106 N. Y. 195.

Q. The president and directors of a warehouse company passed a resolution giving to the president of the company authority to sign receipts for the goods in the warehouse. The president issued a receipt to himself, claiming that he had goods in the warehouse when in fact he had none. The president then pledged such receipts to a bank and received money upon it. The bank sues the company for the amount of the receipt. Judgment for whom and why?

A. Judgment for the defendant. A general power of authority given to an agent to do an act for his principal, does not extend to a case where it appears that the agent is himself the person on the other side. Where a power is intended to be given to the agent to act as such, it must be expressed in language so plain that no other interpretation can rationally be given it. *Bank of N. Y. v. D. & T. Co.*, 143 N. Y. 552.

(NOTE.) This case must be distinguished from the case of *Hanover Nat'l Bank v. D. & T. Co.*, 148 N. Y. 612, where it was held that: "If an officer of a warehouse company having express authority to issue negotiable ware-

house certificates to others for goods deposited, but having no such authority to issue certificates to himself, does issue warehouse certificates in his own favor to the knowledge express or implied of the company's directors, their acquiescence in such acts, after having a reasonable time to put an end thereto, will permit the inference that the act of certifying in his own favor was within the officer's actual authority, and will estop the company from denying as to purchasers for value, that the power to so certify in fact so existed."

Q. In an action by A against B to recover the principal of a certain note, it appeared that B had given A a note for certain money loaned; that when the said note came due, A instructed C, his agent, to collect the interest and take a new note therefor. A did not indorse the note. C collected both the principal and interest, surrendered the note to B, gave the interest to A and made away with the principal. Conceding the above facts as stated, who should have judgment and why?

A. Judgment for A. The agent had express authority to collect the interest only. There was no apparent authority from the mere possession of the note unindorsed to authorize the payment of the principal sum to the agent, and therefore B is not relieved from liability. Anyone who deals with an agent does so at his peril; he should, in order to protect himself, take precautions to ascertain the extent of the agent's authority, and one making payment of a note to an agent, must show that the agent had actual authority to receive payment, or that there was apparent authority from the acts in question. *Doubleday v. Kress*, 50 N. Y. 410.

Q. A loaned to B \$5,000. B gave him (A) collateral as security some certificates of stock for \$15,000, and at the same time also executed a power of attorney and transfer which was attached to the said certificates. A then sold the certificates of stock to C for the full amount. B tendered to C \$5,000 and interest and demanded the return of the certificates of the stock, and upon the refusal of C to do so, B brought suit against him. Judgment for whom and why?

A. Judgment for C. The power of attorney and transfer executed by B gave A apparent authority to sell same. "The

assignment and power were intended for these identical shares; they, as well as the certificates were voluntarily intrusted with apparent ownership and right of disposal, not merely by the negligence of the true owner, but by his voluntary act, and for the purpose of attesting to the world their title and power in case the contingency should arise in which, according to the understanding between them and the plaintiff, they would be justified in resorting to the stock for their indemnity." *McNeil v. Bank*, 46 N. Y. 325.

(NOTE.) In *Bank v. Livingston*, 74 N. Y. 223, it was held that where one went to the bank and requested a loan on certain certificates of stock, stating that he wanted it for another, and which he himself held as collateral to secure a loan he himself made to the owner of the said certificates, and the bank requested him, before making the loan, that he should obtain a transfer and power of attorney, and accordingly he did get a transfer and power of attorney from the owner, the bank could not foreclose the lien as against the owner, on the ground that the bank had notice that the stock did not belong to the party to whom they made the loan, and that the transfer and power of attorney did not give him apparent authority to pledge the certificates for a loan. The transfer and power of attorney would have given him the apparant power to sell the stock if he had claimed to be the owner.

Q. A, who is trustee of the X estate, appoints B to act in his stead. B fraudulently misapplies \$5,000 of the trust funds. A is sued for the amount. Is he liable?

A. A is absolutely liable. In general the power conferred upon an agent is based upon special confidence or trust which the principal has in the agent's personal ability or integrity, and such power, in the absence of authority express or implied, cannot be redelegated by the agent so as to bind the principal. The maxim of *Delegatus non potest delegare* applies in such a case. The authority of an agent to receive money is most clearly a personal trust and confidence which cannot be delegated. *Bodine v. Ins. Co.*, 51 N. Y. 123. "An executor or trustee empowered to sell land in his discretion, cannot authorize an agent to contract for their sale. The power is a personal trust which cannot be delegated, and a contract by an agent is void." *Newton v. Bronson*, 13 N. Y. 587.

(NOTE.) An agent cannot delegate any portion of his authority requiring the exercise of discretion or judgment, otherwise, however, as to powers or duties merely ministerial or mechanical. *Bank v. Norton*, 1 Hill, 501. Where an agent has authority to employ subagents, he will not be liable for their acts or omissions, unless in their appointment he is guilty of fraud or gross negligence, or improperly co-operates in the acts or omissions. But where the agent has no authority, either express or implied, to appoint a subagent, he will be responsible to his principal for the acts of a subagent appointed by him. *Elwell v. Chamberlain*, 31 N. Y. 611.

Q. A directed B to sell his real estate, and authorized him to take any steps necessary to sell the property. B employed C, a broker, to find a purchaser. C effected a sale and brings action against A for commissions. Can he recover?

A. No. The authority to take steps necessary to sell, does not involve authority to employ another broker. *Rice v. Post*, 78 Hun, 547. "The rule was never applied, and in reason can never be applied, so as to validate a delegation of his agency by a broker, else the principal would be at the mercy of his broker, and might be burdened with liabilities to as many deputies as the broker should choose to appoint. The law is settled otherwise. When the subagent has been employed without authority, and his acts are afterwards ratified, he can recover no compensation from his principal, but must look to the agent." 1 Am. & Eng. Ency. of Law, 395; *Carroll v. Tucker*, 50 St. Rep. 611.

Q. The X Bank of New York receives a note payable in Chicago from A and forwards it to the Traders' Bank of Chicago for collection. The Traders' Bank negligently fails to collect. A sues the New York Bank. Can he recover?

A. Yes. The doctrine that a bank receiving a note, draft, or bill of exchange in one state for collection in another state from a holder residing there is liable for neglect of duty occurring in its collection, whether arising from the neglect of its own officers or that of its correspondent in the other state, or an agent employed by such correspondent, in the absence of any express or implied contract varying such liability, is

established by many decisions in New York. *Allen v. Merchants' Bank*, 22 Wend. 215; *Walker v. Bank*, 9 N. Y. 582; *Ayrault v. Pacific Bank*, 47 N. Y. 570.

(NOTE.) A bank receiving for collection a check sent by another bank which holds it only for collection, is the agent of the latter, and not of the payee, because there is no right to delegate the authority in such a case. *Castle v. Corn Exchange Bank*, 148 N. Y. 122.

Q. A, an agent, with power to issue negotiable paper, drew a check for a purpose for which he was not authorized. B, his principal, ratified the act, but subsequently refused to pay, claiming that there was no original authority. Is he liable?

A. Yes. To ratify is to give validity to the act of another. A ratification is equivalent to a previous authority. It operates upon the act ratified in the same manner as though the authority had originally been given. "But before a principal can be held to have ratified the unauthorized act of an assumed agent he must have full knowledge of the facts, so that it can be said that he intended to ratify the act. If his knowledge is partial or imperfect he will not be held to have ratified the unauthorized act, and the proof of adequate knowledge of the facts should be reasonably clear and certain." *Earl, J., in Trustees, etc., v. Bowman*, 136 N. Y. 520.

(NOTE.) Two acts may be ratified,—First, where an agent does an act in excess of his authority. Second, where one assumes to act as the agent of another without authority. "An individual having power to make a contract may ratify or affirm it when made by one who without authority assumes to be his agent; but if the individual himself has no such power he can no more bind himself retroactively to its performance by affirmance or ratification than he could have done prospectively in the first instance. The power to ratify *ex vi termini* implies a power to have made the contract, and the power to ratify in a particular manner implies the power to have made the contract in that manner." *Brady v. Mayor of N. Y., etc.*, 16 How. Pr. 432.

Q. A made a note payable to the order of B. He then forged B's indorsement thereon, and then for its face value transferred it to C. The first information B had of the forgery was a receipt of notice of dishonor as indorser. Subsequently he told

C that the indorsement was a forgery, but that he would indorse the note to save trouble, but he soon changed his mind and refused to pay. A went to Europe. Can C recover against B?

A. Yes. One whose name is forged to a note, may bind himself on the instrument in New York by the unwritten ratification of the signature as his own, made after delivery of the note. *Howard v. Duncan*, 3 *Lansing* (N. Y.), 174; *Thorne v. Bell, Hill & Denio's Reports* (*Lalor's Suppl.*, N. Y.), 430; *Title Guarantee & Trust Co. v. Haven*, 126 App. Div. 806.

Q. A gives B, his agent, power to sell real estate. B, knowing that A is short of funds and in need of cash, obtains a mortgage on the property and signs the same as A's agent under the power to sell. He sends the money thus obtained to A, who dies intestate having retained the money. What are the rights of A's heirs as to the mortgage?

A. The heirs hold subject to the mortgage. By accepting and retaining the money, which was the fruit of the agent's act, without objection, the principal is presumed to have ratified that act. Having received the benefits of the contract the heirs could not, as their intestate had signified his acquiescence, invoke the courts to relieve them of the obligation. *Hyatt v. Clark*, 118 N. Y. 563. A principal cannot enjoy and retain the fruits or benefits of the act of his agent, without adopting and ratifying the instrumentalities by which those fruits were obtained, even though employed without his authority or knowledge. *Baldwin v. Burrows*, 47 N. Y. 199.

Q. A, the agent of B, sells a certain piece of land of B's to C, and at the time of the sale makes fraudulent representations to C to induce him to purchase. C sues B for the damages sustained. Is B liable?

A. Yes. When an authorized agent acting within the scope of his authority perpetrates a fraud for the benefit of his principal, and the latter receives the fruits of it, he is liable as for

his own wrong. *Bennett v. Judson*, 21 N. Y. 238; *Elwell v. Chamberlain*, 31 N. Y. 611. These authorities rest upon the principle that when a party clothes another with authority to speak in his behalf, and indorses him to third persons as worthy of trust and confidence, those who are misled by the falsehood and fraud of the agent are entitled to impute it to the principal. The latter will not be permitted to retain the fruits of a transaction infected with fraud, whether the deceit he seeks to turn to his profit, was practiced by him or his accredited agent. In such a case, he cannot separate the legal from the illegal elements of the contract, and appropriate the advantages it secures, while he rejects the corrupt instrumentalities by which they were obtained. "The rule which charges a principal with the knowledge of his agent is for the protection of innocent third persons. If a person colludes with an agent to cheat the principal, the latter is not responsible for the act or knowledge of the agent." *Ins. Co. v. Minsch*, 53 N. Y. 144.

Q. A, a merchant, entered into an agreement with the X company, a mercantile agency, for information as to the financial condition of C to be furnished by D, the agent of the X company. D knowingly gave A false information concerning C's financial standing. A, relying on the information, gave C credit and was damaged thereby. In an action against the X company for damages sustained thereby, will a recovery be allowed?

A. Yes. A principal is liable for the fraud and deceit of its agent which was committed for the principal in the course of and as a part of the agent's employment and within the scope of his authority, though the principal did not in fact authorize the practice of such an act. *Bank v. Dun*, 51 Fed. Rep. 160.

Q. A is employed as an investigator for the X R. R. Company to interview witnesses and take statements from them. In the course of an interview with B, a witness, in an action pending against the company, A promises to pay B a sum of

money if B will testify falsely in favor of the company. On the trial of the action the attorney for the plaintiff offers to introduce evidence showing A's attempted bribery of the witness. The company's attorney objects on the ground that A's acts were unauthorized and not within the scope of his employment. How should the court rule and why?

A. The evidence is admissible as the act, although unlawful, must be deemed to be within the scope of his employment. "He was acting in the course of his employment, for he was employed to procure witnesses. The power of the corporation was intrusted to him with reference to that subject, to be used as he saw fit. His acts related solely to that subject and were done by him as its agent, wholly for its benefit. If he adopted a method not contemplated by the defendant still it is responsible for what he did in the line of his employment to promote its interest." *Vann, J., in Nowack v. Ry. Co.*, 166 N. Y. 433.

(NOTE.) The declaration of an agent is only admissible against the principal when made as part of a transaction undertaken in behalf of the principal, or in the performance of the duties of his agency. An agent cannot bind his principal, even in matters touching his agency when he is known to be acting for himself, or to have an adverse interest. *Ins. Co. v. R. R. Co.*, 139 N. Y. 146; *Jarvis v. R. R.*, 148 N. Y. 652.

Q. A is the agent of B to deposit with the X Bank and to procure the bank's checks therefor which he is to indorse and transmit to his principal. A deposits the money to his own credit without disclosing his agency, and in order to defraud B for his own benefit by drawing against the deposits, A secretly agrees that the bank's checks issued as memoranda of the deposits and made payable to A's order under the assumption that he was acting for himself alone should be returned to the bank without delivery to anyone. A indorses the checks and mails them to B and then draws out the amount to his credit in the bank. Can B recover the amount of the checks from the bank?

A. Yes, as B cannot be charged with notice of the agreement made by A with the bank, as the object of such agreement

was to defraud the principal. "The general rule that notice to the agent, while acting within the scope of his authority and in regard to a matter over which his authority extends, is notice to the principal, rests upon the duty of disclosure by the former to the latter of all the material facts coming to his knowledge with reference to the subject of his agency and upon the presumption that he has discharged that duty. The presumption, however, does not always arise for there are several exceptions well recognized by the authorities. Thus when the agent has no legal right to disclose a fact to his principal, or he is engaged in a scheme to defraud his principal, the presumption does not prevail, because he cannot in reason be presumed to have disclosed that which was his duty to keep secret, or that which would expose and defeat his fraudulent purpose." *Henry v. Allen*, 151 N. Y. 1.

Q. A, the manager of a telegraph station, systematically overcharges B, a customer, in the transmission of messages and sends B monthly statements of the charges. A collects the amounts of the statements from B and remits to the telegraph company the actual amount of the charges. B discovering the overcharges brings action against the company to recover the amount overpaid. Can he recover?

A. Yes. The act of A in making and retaining the overcharge was, although unauthorized, done within the scope of his authority. "A principal is liable to a third person for the misconduct of his agent committed in the line of his employment, even though the offense was in excess of his authority and the principal did not authorize, justify or know of it." *Birkett v. Tel. Co.*, 103 App. Div. 115, *aff'd* in 186 N. Y. 591.

Q. A appoints B as his agent to sell his horse, instructing him (B) not to warrant the soundness of the animal. B gives a warranty on the sale. A is sued for breach of warranty. Is he liable?

A. Yes. He is liable, as horses are usually sold with war-

ranty, and the authority to warrant is implied. Whether an agent is authorized to give a warranty in a particular case, must depend upon the character of his agency, the usage of trade in the locality in which the sale is made, and the subject of the sale. Ordinarily an agent vested with discretion, and having authority to do whatever is necessary to carry out the object of his agency, may bind his principal by a warranty. *Ahearn v. Goodspeed*, 72 N. Y. 106; *Murray v. Smith*, 4 Daly, 277. "The idea upon which is founded the right to warrant on the part of an agent to sell a particular article, is that he has been clothed with power to make all the common and usual contracts necessary or appropriate to accomplish the sale of the article intrusted to him. And if in the sale of that kind or class of goods thus confided to him, it is usual in the market to give a warranty, the agent may give that warranty in order to effect the sale, and the law presumes that he had such authority. If the agent with express authority to sell has no actual authority to warrant, no authority can be implied where the property is of a description not usually sold with warranty." *Peckham, J., in Wait et al. v. Borne et al.*, 123 N. Y. 592; *Bierman v. City Mills Co.*, 151 N. Y. 482.

Q. A sends B his shares of stock in the X Bank to be sold at par. In order to induce C to purchase the stock, the broker gives him a warranty in the name of his principal, that the stock is actually worth par. The broker returns the proceeds of the sale less his commission to A, with no information regarding the warranty. A retains the proceeds. The X Bank is really insolvent at the time of this transaction, although A knew nothing of the insolvency and actually thought the stock was worth par. C was damaged to the extent of \$5,000 by the deal. Can he maintain action against A on the warranty?

A. A is not liable on the warranty. An agent with express authority to sell has no implied authority to warrant where the property is of a description not usually sold with warranty. One employed to make a sale of bank stock is not presumptively empowered to warrant it in the name of his principal.

The receipt of the proceeds by the owner of the stock in ignorance of an unauthorized warranty by the agent, is not a ratification of the unauthorized engagement. The ratification of the act of an agent previously unauthorized, must, in order to bind the principal, be with a full knowledge of all the material facts. *Smith v. Tracey*, 36 N. Y. 79.

Q. X, Y and Z, who are trustees of the Seamen's Society, sign, seal and deliver a bond to John Brown. They are sued on the bond personally. Can the action be maintained? The bond was executed in the following form: "X, Y & Z, trustees of the Seamen's Society."

A. Yes. The seals are not those of the society, and the affixing of the names of their offices does not relieve the parties from liability. Such words will be regarded merely as descriptive of the persons. Unless the promise purports to be by the corporation it is that of the persons who subscribe to it; and the fact of adding to their names some official title has no signification as qualifying their obligation, and imposes no liability on the corporation whose officers they may be. This must be regarded as the long and well-settled rule in this state. *Taft v. Brewster*, 9 Johns. 344; *Hills v. Bannister*, 8 Cowen, 31; *Moss v. Livingston*, 4 N. Y. 208.

Q. A contract under seal began by stating that it was made between Thompson, by Smith, his attorney, and Jones. The concluding was: "In witness whereof the said Smith, as attorney for the said party of the first part has set his hand and seal." Signed by Jones and by Smith, attorney for Thompson. Thompson sues Jones. Jones demurs and answers that the agreement was between himself and Smith, and that Thompson cannot maintain the action. Judgment for whom and why?

A. Judgment for Thompson. When an authorized agent executes a contract under seal in which he represents himself as agent and discloses his principal, and by the terms of which he assumes to contract for the principal only, in the absence of any personal promise or covenant on his part, the contract cannot be held to be his contract, for it is the contract of the

principal who alone can sue and be sued upon it. The agent cannot be liable individually thereon, although it is only signed in his individual name. *Whitford v. Laidler*, 94 N. Y. 145.

Q. J is the president of the A Corporation, and G of the X Corporation; they make a joint note in the usual form to B. They have the authority to make such notes for their respective corporations; the note is drawn on a corporation blank with the name of the A corporation across the end. The note is signed J, president of the A Corporation, and G, president of the X Corporation. Are they personally liable on the note?

A. Yes. "Where a negotiable promissory note has been given for the payment of a debt contracted by a corporation, and the language of the promise does not disclose the corporate obligation and the signatures to the paper are in the names of individuals, a holder, taking bona fide and without notice of the circumstances of its making, is entitled to hold the note as the personal undertaking of its signers, notwithstanding they affix to their names the title of an office. Such an affix will be regarded as descriptive of the persons and not of the character of the liability. This rule is well settled and is founded in the general principle that in a contract every material thing must be definitely expressed and not left to conjecture. Unless the language creates or fairly implies the undertaking of the corporation, if the purpose is equivocal, the obligation is that of its apparent makers. The appearance upon the margin of the paper of the printed name of the corporation was not a fact carrying any presumption that the note was, or was intended to be, one by the company. It was competent for its officers to obligate themselves personally for any reason satisfactory to themselves, and, apparently to the world they did so by the language of the note, which the mere use of a blank form of a note having upon the margin the name of their company, was insufficient to negative." *Gray, J., in Casco Nat. Bank v. Clark*, 136 N. Y. 307.

Q. A gave B instructions to go to C and purchase a horse for him. B went to C and made the purchase. The horse

was delivered by C, and then B told C that the purchase was for A. What rights has C in the matter?

A. C can sue either A or B. Where goods are sold to a person whom the vendor believes to be a purchaser, but who in fact bought as agent for another, the vendor may, on discovery of this fact, maintain an action against the principal for the purchase price. *Meeker v. Claghorn*, 44 N. Y. 349; *Kayton v. Barnett*, 116 N. Y. 625. This is a case in which the rule commonly known as the doctrine of undisclosed principal applies. At first glance the rule is foreign to the idea of contract (mutual assent), for the minds of A and C did not meet, but the courts, in order that the person who obtains the benefit of the contract shall not escape its burden, invoked in their aid the fiction of identity, i. e., the principal and agent are considered one and the same person, and hold the principal liable. The doctrine of mutuality is applied in these cases and the undisclosed principal is allowed to sue the other party.

Q. A makes a contract with B in writing. A is in fact acting for C, an undisclosed principal. B sues C, and at the trial offers evidence to show that the contract was in fact made for C. Can B recover against C?

A. Yes. A party who has entered into a written contract may maintain an action against the principal upon parol proof that the contract was in fact made for the principal where the agency was not disclosed by the contract and was not known to the plaintiff when it was made. Such proof does not contradict the written contract. It superadds a liability against the principal to that of the agent. That parol evidence may be introduced in such a case to charge the principal, while it would be inadmissible to discharge the agent, is well settled by authority. *Coleman v. Bank*, 53 N. Y. 393; *Ludwig v. Gillespie*, 105 N. Y. 653.

Q. A appointed B as his agent for the purpose of purchasing certain lands belonging to C. B, without disclosing the agency, entered into a contract under seal with C whereby he agreed

to purchase such lands at a specified price; the contract was executed in his own name. C sues A for the purchase price, offering to execute a good and sufficient deed. Can A recover?

A. No. "A was not a party to the agreement. He did not sign it himself, nor did it purport to have been executed for him by B. His name did not appear in it, and there is nothing upon the face of the agreement to indicate that he was in any way connected with or interested in the purchase. The covenants in the agreement are solely between B and C. Those persons only can be sued on an indenture who are named as parties to it, and an action will not lie against one person on a covenant which purports to have been made by another. It is true that a principal may be charged upon a written parol executory contract entered into by an agent in his own name, within his authority, although the name of the principal does not appear in the instrument and was not disclosed. But there is a well-recognized exception to this rule in the cases of sealed instruments. C's agreement was with B and not with A. To change it from a specialty to a simple contract, in order to charge the principal, is to make a different contract from the one the parties intended. A seal has lost most of its former significance, but the difference between specialties and simple contracts is not obliterated." Andrews, J., in *Briggs v. Part-ridge*, 64 N. Y. 357.

Q. A, who was agent for B, ordered certain painting done to a building belonging to B at the agreed price of \$250. The painter did the work as ordered and sent his bill to A. The painter knew that A was acting for some one, but for whom A did not disclose as he would readily have done had the painter asked. A refused to pay for the work, and then disclosed B, his principal. The painter brings action against A, who defends on the ground that he was acting for B, and therefore not liable. Judgment for whom and why?

A. Judgment for the painter. "An agent is personally liable on a contract made for a principal not named by him,

although he states to the contractor that he is not the owner of the premises where the work is to be done, but is merely the attorney for the owner." *Nichols v. Weil*, 30 Misc. 441. "Knowledge in plaintiffs that defendant might have acted as agent was not enough, and it was not the duty of the plaintiffs to inquire before paying whether the defendant was acting as principal or agent; it was the duty of the defendant, if it desired to be protected as agent, to have given notice of its agency." *Earl, J., in Holt v. Ross*, 54 N. Y. 472; *Cobb v. Knapp*, 71 N. Y. 348. "That an agent may contract in his own personal capacity and thus be bound to the persons with whom the contract is made, is elementary. It is competent for an agent, although fully authorized to bind his principal, to pledge his own responsibility instead. Such a personal undertaking is not necessarily inconsistent with his character as an agent, and when he has so bound himself, he will be liable." *Martin, J., in DeRemer v. Brown*, 165 N. Y. 410.

Q. A, the owner of property, appoints B as his agent to collect the rents of certain premises. A thereafter dies, and one of the tenants continues to pay the rent to B. B thereafter absconds. Can the administrator recover the rent from the tenant?

A. Yes. The question is not new, and it has been uniformly answered by our decisions to the effect that the death of the principal puts an end to the agency, and therefore is an instantaneous and unqualified revocation of the authority of the agent. There can be no agent where there is no principal. No notice is necessary to relieve the estate of the principal of responsibility, even on contracts into which the agent had entered with third persons who were ignorant of his death. Those who deal with an agent are held to assume the risk that his authority may be terminated by death without notice to them. *Weber v. Bridgman*, 113 N. Y. 600.

Q. A being indebted to B, his agent, gives him (B) authority to sell certain goods and to pay himself from the pro-

ceeds the amount which is due him. A dies before the goods are sold, and his representatives seek to recover the goods from the agent. Can they do so?

A. No. In this case, the power given is coupled with an interest in the goods, and so irrevocable by the death of the principal or otherwise. To make the agency irrevocable there must be an interest in the subject of the agency itself, and not a mere interest in the result of the execution of the agency. Where power to sell property is given as a security for the purpose of reimbursing the agent, the power is not revocable. The law on this point has been very well settled since the early and very leading case of *Hunt v. Rousmanier*, 8 Wheaton (U. S.), 174, where Chief Justice Marshall who delivered the opinion of the court, says: "The general rule, that a power ceases with the life of the person giving it, admits of one exception. If a power be coupled with an interest, it survives the person giving it, and may be executed after his death. As this proposition is laid down too positively in the books to be controverted, it becomes necessary to inquire what is meant by the expression, 'a power coupled with an interest.' Is it an interest in the subject upon which the power is to be exercised, or is it an interest in that which is produced by the exercise of the power? We hold it to be clear, that the interest which can protect a power after the death of a person who creates it, must be an interest in the thing itself. In other words, the power must be engrafted on an estate in the thing." The doctrine of this case has been uniformly followed in New York. *Knapp v. Alvord*, 10 Paige's Ch. 205; *Hutchins v. Hebbard*, 34 N. Y. 24.

Q. A hired B as his agent, and in the contract of hiring it was agreed that the authority given the agent to sell goods should not be revoked for five years. After one year, A, the principal, revokes the agency. The agent refuses to cease acting. What are the rights of the parties?

A. The principal may revoke but must respond in damages for breach of the contract. The distinction must be drawn

between the power and the right to revoke. As agency is a personal relation, it depends for its existence upon the will of the principal who creates it; and he may, therefore, recall the appointment of an agent of his own selection at his pleasure, unless the agency is coupled with an interest. Although the power to revoke may exist in a given case, yet it cannot be exercised without rendering the principal liable in damages, when he has agreed that the agency shall not be revoked for a certain period. *Hunt v. Rousmanier*, *supra*.

Q. A engaged a broker to sell a certain piece of property at a certain price; afterwards A sells it to C, a friend of his; next day the broker brings a purchaser willing to buy at the stipulated price. What are the broker's rights against A?

A. The broker has no rights. This is a revocation by disposition of the subject-matter, and as the property which was the subject-matter of the agency, has been sold by the principal, the agency ceases *ipso facto*. In such a case, the principal violates no rights of the broker by selling to the first party who offers the price asked. He failed to find or produce a purchaser upon the terms prescribed in his employment, and the principal was under no obligations to wait longer, that he might make further efforts. Where no time for the continuance of a contract is fixed by its terms, either party is at liberty to terminate at will, subject only to the ordinary requirements of good faith. Usually the broker is entitled to a fair and reasonable opportunity to perform his obligation, subject of course to the right of the seller to sell independently. But, that having been granted to him, the right of the principal to terminate his authority is absolutely unrestricted, except only that he may not do it in bad faith, and as a mere device to escape the payment of the broker's commission. The principal has an absolute right before a bargain is made, while negotiations remain unsuccessful before commissions are earned, to sell the property and thus revoke the broker's authority, and the latter cannot thereafter claim compensation for a sale made by the principal.

Wylie v. Marine Nat. Bank, 61 N. Y. 416; Sibbald v. Bethlehem Iron Co., 83 N. Y. 378.

Q. A is employed by B as agent. Thereafter A is discharged. Subsequent to his discharge A buys goods from C in the name of B and then absconds with the goods. Is B liable for the value of the goods?

A. Yes. When one has constituted and accredited another his agent to carry on his business, the authority of the agent to bind the principal continues even after an actual revocation, until notice of the revocation is given; and as to persons who have been accustomed to deal with such agent, until notice of the revocation is brought home to them. As to prior dealers actual notice is necessary, while as to others constructive notice, for instance, publication in a newspaper is held sufficient. *Claffin v. Lenheim*, 66 N. Y. 301.

Q. A, a commercial agent, sold some goods to B on thirty days' credit. The house accepted the order and shipped the goods. The agent was instructed by the house he represented to make no collection. At the expiration of thirty days' time, the agent called upon B and presented a bill for the goods. B paid him (A) the amount thereof. A subsequently absconds. B is sued by the house for the price of the goods. Is he liable, and upon whom does the loss fall?

A. The loss must fall upon B. Ordinarily a mere sales agent has no authority to receive payment for goods sold by him for the owner; his only authority is to find a purchaser. Mere authority to sell does not imply authority to collect. But where a person is apparently clothed with full authority to sell and deliver, a payment to such person is good as against the owner. *Maxfield v. Carpenter*, 84 Hun, 450.

(NOTE.) Where goods are sold by an agent, and there is notice direct or implied to pay the price to the principal, payment by the vendee to the agent will not bind the principal nor protect the vendee. *Lamb v. Hirschberg*, 1 App. Div. 518.

Q. A appoints B as his agent to sell a certain piece of real estate for him, naming \$10,000 as the price. B is able to secure \$15,000 for the property and sells for that amount. He gives \$10,000 to his principal and retains the balance. A upon discovering the facts consults you. What are his rights?

A. He can recover the \$5,000 from his agent. An agent owes a duty to his principal to secure the best price he can. It was the duty of the agent to get the highest price for the real estate that could be obtained for it in the market. An agent has duties to discharge of a fiduciary character towards his principal, and will not be allowed to make secret profits. *Dunlop v. Richards*, 2 E. D. Smith, 181; *Bain v. Brown*, 56 N. Y. 285.

Q. A employs B to purchase silk for him at \$1 per yard. B informs A that he has purchased for that price. He then sends A the desired quantity of his own silk. B sues for the price. Can he recover?

A. No. An agent cannot sell his own goods to his principal without the knowledge of the latter, as the fiduciary relation which exists between them forbids it. *Conkey v. Bond*, 36 N. Y. 427. "It amounted to a sale by the plaintiffs of 100 shares of their own stock to the defendant, which was not binding upon the defendant for the reason that the law does not permit an agent employed to purchase, to buy of himself. It is no answer that the intention was honest and that the brokers did better for their principal by selling him their own stock than they could have done by going into the open market. The rule is inflexible, and although its violation in the particular case caused no damage to the principal, he cannot be compelled to adopt the purchase." *Rapallo, J., in Taussig et al. v. Hart*, 58 N. Y. 425.

Q. A, the owner of real estate, placed it in the hands of B for sale. B's clerk, unknown to A, became the purchaser for \$5,000, after having informed A in B's name that it was doubt-

ful if more could be obtained. A subsequently becoming dissatisfied with the sale, consults you. What are his rights against B and the clerk? Reasons.

A. A can have the conveyance set aside, or have judgment compelling B or the clerk to pay to him the ascertained value of the land. "It is a principle that an agent, trustee or other person in a fiduciary capacity, can never be a purchaser; and I assume it as not requiring proof that this principle must be admitted, not only as established by adjudication, but also as founded in indispensable necessity, to prevent that great inlet of fraud and those dangerous consequences which would ensue if agents or trustees might themselves become purchasers, or if they were not in every respect kept within compass." *Munro v. Allaire*, 2 Caines' Cases (N. Y.), 183. This rule has been affirmed in many subsequent cases. *Dobson v. Racey*, 8 N. Y. 216; *Jewett v. Miller*, 10 N. Y. 402. "It is undeniable from these authorities, that if the purchase in this case had been made by B, it could not be sustained. Does the same principle apply to a purchase made by the clerk? It is not perceived upon what substantial ground a distinction can be drawn. Whatever duty B owed to A, he, the clerk, equally owed the same. And it has so been held." *Poillon v. Martin*, 1 Sandf. Ch. 569; *Gardner v. Ogden*, 22 N. Y. 327.

Q. A engaged B, a broker, to sell his farm, and agreed to pay 5% commission. C, about the same time, also engaged B to look up a farm for him and agreed to pay 5% commission. B brought A and C together, and they closed the transaction. Neither party knew that B was acting for the other. B charges both A and C the 5% commission, and they both refuse to pay it after discovering the facts. B comes to you for advice. What are his rights?

A. B can recover from both. Real estate brokers employed as middlemen to bring purchasers and sellers together to enable them to make their own bargain, may charge commissions

to both parties. They are not agents to buy and sell, and not within the rule which prohibits their acting without consent, as agent for both buyer and seller. *Siegel v. Gould*, 7 Lansing (N. Y.), 177. "It is undeniable that where the broker or agent is invested with the least discretion, or where the party has the right to rely upon the broker for the benefit of his skill or judgment, in any such case, an employment of the broker by the other side in a similar capacity, or in one where by possibility his duty and interest might clash, would avoid all his right to compensation. The whole matter depends upon the character of his employment." *Knauss v. Krueger Brewing Co.*, 142 N. Y. 70. Also *Gracie v. Stevens*, 56 App. Div. 203; *Siegel v. Rosenzweig*, 129 App. Div. 547.

(NOTE.) Where in a negotiation for the sale or exchange of real estate, a broker is employed by both parties with notice that he is acting for the other in the matter, and with such notice each agrees to pay him his commissions, he can recover from both. *Rowe v. Stevens*, 53 N. Y. 621.

Q. Your client hands a broker \$10,000 to loan on bond and mortgage, which he did. The bond and mortgage were left with the broker to collect the semi-annual interest when due, but not to collect the principal when due. The broker collected the principal and interest, and by a forged satisfaction piece satisfied the record and gave the bond and mortgage to the mortgagor and absconded with the principal. Who must bear the loss?

A. The loss falls upon the mortgagee, as the mortgagor is authorized to infer that the agent is empowered to receive both interest and principal from his having possession of the bond and mortgage. *Williams v. Walker*, 2 Sandf. Ch. 325. A mortgagor who makes payment to one, other than the mortgagee, does so at his peril. If the payment be denied, upon him rests the burden of proving that it was paid to one clothed in authority to receive it. There is, however, one exception to this rule. If payment be made to one having apparent authority to receive the money, it will be treated as if actual authority had been given for its receipt. So if a mortgagee permits a broker who negotiates a loan to retain in his posses-

sion the bond and mortgage after the principal is due, and the mortgagor with knowledge of that fact and relying upon the apparent authority thus afforded, shall make a payment to him, the owner will not be permitted to deny that the attorney possessed the authority which the presence of the securities indicated he had. Having conferred the apparent authority upon the agent, the principal is estopped from denying that the actual authority existed. *Smith v. Kidd*, 68 N. Y. 130; *Brewster v. Carnes*, 103 N. Y. 556.

Q. A through B, his attorney, loaned C \$8,000 on bond and mortgage for five years. The papers were left in B's possession, and he was authorized to collect the interest but not the principal. After the principal became due, B received from C two payments of \$1,000 each to apply on the principal, the bond and mortgage being each time produced by B. On a subsequent occasion, \$1,000 more was paid to B to apply on the principal, but the bond and mortgage were not produced, though B then had them in his possession and told C so. B then sold the bond and mortgage and forged an assignment of them to the purchaser. After that B received from C the balance due upon the mortgage. A brings foreclosure. Can he recover, and what are the rights of the parties?

A. Judgment for A for \$5,000. Clearly as to the first two payments, the attorney had apparent authority to receive the principal, and the mortgagor could not deny to them the effect of payment *pro tanto* by proof that he did not have actual authority. As to the subsequent payment of \$1,000, it is true, C did not at the time of making the payment see the bond and mortgage, but it was actually in the possession of the attorney, and the attorney so informed him. Here then was possession and information of the possession. It was possession upon which he acted, and inasmuch as it was true, it constituted apparent authority. If it turned out to be untrue, it could not have availed him. There is no ground for insisting that a party must actually see and examine the securities in order to entitle him to the protection of the doctrine

of apparent authority; if he have trustworthy information of the fact which he believes and relies upon, and it shall prove to be true, there seems to be no reason why it should not avail him as well as a personal examination of the securities. It follows that the defendant should have been credited with the third payment of \$1,000. As to the remaining \$5,000 that was paid to B after he had parted with the bond and mortgage, C's failure to take the precaution of ascertaining whether the attorney was actually in the possession of the securities when he paid the \$5,000, deprived him of the right to assert that he was induced to make the payment because it appeared to him that the attorney had the right to receive the money. "Information of the physical fact of possession by the attorney is alone effectual for protection. And he must have such knowledge when every payment is made, for no presumption of a continuance of possession can be indulged in, for the purpose of giving support to an apparent authority on the part of an attorney to act, where no actual authority exists. The rule comprises two elements: First, possession of the securities by the attorney with the consent of the mortgagee; second, knowledge of such possession on the part of the mortgagor. The mere possession of the securities by the attorney is not sufficient. The mortgagor must have knowledge of the fact. It is the appearance of authority to collect, furnished by the custody of the securities, which justifies him in making payment. And it is because the mortgagor acts in reliance upon such appearance, an appearance made possible only by the act of the mortgagee in leaving the securities in the hands of an attorney, that estops the owner from denying the existence of authority in the attorney which such possession indicates." Parker, J., in *Crane v. Gruenewald*, 120 N. Y. 274.

(NOTE.) "Where an agent who invests for his principal in an outstanding bond and mortgage, is permitted to collect the interest thereon and to retain possession and control of the security, he has apparent authority after maturity to receive payment thereof, and his principal is estopped from denying that he possessed such authority." *Central Trust Co. v. Folsom*, 167 N. Y. 285.

Q. A, doing business in France, sends B as agent to New York with authority to receive consignments of goods, to care for and sell them, and after paying all expenses from receipts to remit the balance to A. B borrows \$1,500 from C and does not pay the same. C sues A for the money loaned. Can he recover?

A. No. There is no authority to be implied that the agent could borrow money for his principal from the naked power to receive and sell property and remit the proceeds. To authorize an inference of authority in an agent, it must be practically indispensable to the execution of the duties really delegated; it is not sufficient that the act of the agent is convenient or advantageous. *Bickford v. Menier*, 107 N. Y. 490.

Q. An agent having a sample in his possession, warrants the goods to come up to the sample. When A, a purchaser, is sued for the purchase price and he sets up the breach of the warranty, the plaintiff sets up that the agent had no authority. Is this defense to the counterclaim available?

A. No. An agent authorized to sell property must be presumed to possess such authority to make such representations in regard to the quality and condition of the goods sold, as usually accompany such transactions. Therefore an agent, who has been given authority to sell goods by sample, has implied power to warrant the quality of the goods and that the bulk corresponds with the sample. *Meyer v. Dean*, 115 N. Y. 556.

CHAPTER II

Bailments

Q. A takes fifty bushels of wheat to a miller to be made into flour. Miller sells the wheat to B. What rights has A in the matter?

A. A can replevy the wheat from B, or sue either the miller or B for conversion. An agreement to deliver wheat to be manufactured into flour is a bailment merely, and not a sale, and therefore A may replevy the wheat. *Mallory v. Willis*, 4 N. Y. 76. Where a contract is made with a manufacturer to deliver to him raw materials to be returned manufactured, the contract is one of bailment and not of sale, and title to the articles when manufactured remains in the original owner. *Foster v. Pettibone*, 7 N. Y. 433. The fundamental distinction between a bailment and a sale is, that in the former, the subject of the contract, although in an altered form, is to be returned to the owner; whilst in the latter there is no obligation to return the specific article; the party receiving it is at liberty to return some other thing of equal value in place of it.

Q. A, a farmer, makes a contract with B, a manufacturer, whereby A agrees to deliver to B certain produce, and B agrees to manufacture same into pickles. It is also agreed between the parties that the pickles are to be sold and the proceeds divided between them. The sheriff, upon an execution of a judgment against B, levies on the pickles. A sues the sheriff in conversion. Can he recover?

A. Yes. "When property in an unmanufactured state is delivered by one person to another, upon a contract that it shall be manufactured or improved by his labor and skill, and when thus improved in value, shall be divided in certain

proportions between the respective parties or sold and the proceeds divided, it constitutes a bailment, and the original owner retains his exclusive title to the property until the contract is completely executed, although the labor to be performed by the bailee may be equal or greater in value than that of the property when received by him." *Sattler v. Halleck*, 160 N. Y. 291.

Q. A, a contractor, gives to B, a tailor, cloth to make 100 suits of clothes; suits to be made according to sample, and at a certain price. B makes the clothes, but they are not according to sample, and A refuses to pay for them. Who has the title to the cloth while in the possession of B? What are the rights of the parties?

A. Title remains in A, and B cannot recover as the suits were not made according to sample. The owner of materials who delivers them to another to be manufactured into goods does not lose his property therein, nor is he precluded by receiving the manufactured articles from asserting his title, and at the same time resisting a recovery for the work on the ground that the workman has not performed his contract. *Mack v. Snell*, 140 N. Y. 193.

Q. A and B contract, A to furnish the principal part of the materials, and B some minor materials, and to do the work necessary to make a quantity of shears, which are to correspond to a sample furnished by A. Part of the shears have been made and delivered, when it is found that they have a latent defect, and A refuses to take any more or to pay for those already delivered. What are the rights of the parties?

A. B has no rights: "The contract was one of bailment and not of sale and purchase, and so title to the completed articles was at all times in the bailor, and this, notwithstanding his refusal to receive them; the bailees having wholly failed to perform were not entitled to recover anything for their work; and the acceptance of a part of the articles, and the omission to return them on discovery of the defect or to notify bailees

thereof, did not preclude the bailor from claiming nonperformance, as he had the absolute right to retain them, and was neither bound to inspect them or notify bailees of his objection; also the bailor was entitled to recover as upon a counterclaim as damages, the difference between the price agreed upon for bailee's work and the value of the articles had they been made according to sample." *Mack v. Snell*, *supra*.

Q. A loaned to B certain war relics to be exhibited in his, B's, museum to which an admission fee was charged, and the proceeds thereof given to charity. The war relics were to be returned at the end of one year, and A was to receive nothing for their use. At the end of nine months and without any fault of B, the said war relics were destroyed by fire. A brings action against B to recover their value. The above facts appearing, judgment for whom and why?

A. Judgment for B. As the loss was occasioned by no fault of B, the law will imply a condition to the return of articles loaned, that they shall be in existence at the time they are to be returned, and in case they are destroyed without any fault of the borrower, their return will be excused. *Young v. Leary*, 135 N. Y. 169.

Q. A delivered to B 1,000 bushels of wheat from which he was to receive 200 barrels of flour. The miller placed the wheat in his granary, which without his negligence, was burnt. Upon whom does the loss fall? Why?

A. The loss must fall upon A. This is a bailment and not a sale as B was to deliver flour from the same wheat received. A bailee is only liable for loss occasioned by his own negligence; he is not an insurer. "The cases agree that where a bailee of goods, although liable to their owner for their loss only in case of negligence, fails nevertheless upon their being demanded, to deliver them or account for such nondelivery; this is to be treated as *prima facie* evidence of negligence. *Burnel v. R. R. Co.*, 45 N. Y. 184; *Steers v. Liverpool S. S. Co.*, 57 N. Y. 1;

Fairfax v. R. R. Co., 67 N. Y. 11. The rule proceeds either from the necessity of the case, it being presumed that the bailee has exclusive knowledge of the facts and that he is able to give the reason for his nondelivery, if any exist, other than his own act or fault, or upon a presumption that he actually retains the goods and by his refusal converts them. But where the refusal to deliver is explained by the fact appearing that the goods have been lost, either destroyed by fire or stolen by thieves, and the bailee is therefore unable to deliver them, there is no *prima facie* evidence of his want of care, and the court will not assume in the absence of proof on the point, that such fire or theft was the result of his negligence. *Schmidt v. Blood*, 9 Wend. 269; *Lamb v. R. R. Co.*, 46 N. Y. 271. It will be seen as the result of these authorities, that the burden is ordinarily upon the plaintiff alleging negligence, to prove it against a warehouseman who accounts for his failure to deliver by showing a destruction or loss by fire or theft. It is of course not intended to hold that a warehouseman, refusing to deliver goods, can impose any necessity of proof upon the owner by alleging as an excuse, that they have been stolen or burned. These facts must appear or be proven with reasonable certainty. The warehouseman in the absence of bad faith is only liable for negligence. This burden is never shifted from him. If he proves the demand upon the warehouseman and his refusal to deliver, these facts unexplained are treated by the courts as *prima facie* evidence of negligence; but if either in the course of his proof or that of the defendant, it appears that the goods have been lost by theft, the evidence must show that the loss arose from the negligence of the warehouseman." Hand, J., in *Clafin v. Meyer*, 75 N. Y. 260.

Q. A leaves a watch with a jeweler to be repaired. The shop was burglariously entered without fault of the jeweler, and A's watch was stolen. A brings action against the jeweler. Can he recover? State the rule.

A. Upon it appearing that the goods were lost by a burglary committed upon the defendant's shop, it was for the plaintiff

to establish affirmatively, that such burglary was occasioned or was not prevented by reason of some negligence or omission of due care on the part of the jeweler, and as there was no negligence or fault on the part of the jeweler, A clearly could not recover. The rule is, that the bailee is only liable for loss of goods when he has been negligent. *Claffin v. Meyer*, *supra*. "In the present case the plaintiff alleged in his complaint and it appeared that the loss resulted from the destruction of the factory by fire. From that fact alone, no presumption arose to furnish a *prima facie* case against the defendant. But upon the main issue, whether it was attributable to the negligence of the defendant, the burden was with the plaintiff." *Stewart v. Stone*, 127 N. Y. 500.

(NOTE.) "Negligence may in a proper case be presumed from the mere happening of the accident, as where the bailee's warehouse in which the property is stored, collapses while repairs necessitated by a fire are being made." *Kaiser v. Lattimer*, 40 App. Div. 149.

Q. A, while traveling, stopped at the B hotel and placed for safe-keeping his valuables with the owner of the hotel who put them in a safe for that purpose. The safe was burglariously broken open and A's valuables stolen. A brings action against the owner of the hotel. Can he recover?

A. Yes, as the hotel keeper is considered an insurer of the goods and valuables of his guests. "The principle upon which innkeepers are charged by the common law as insurers of the money or personal effects of their guests originated in public policy. It was deemed to be a sound and necessary rule that this class of persons should be subjected to a high degree of responsibility in cases where an extraordinary degree of confidence is necessarily reposed in them; and where great temptation to fraud and danger of plunder exists, by reason of the peculiar relations of the parties." *Adams v. N. J. Steamboat Co.*, 151 N. Y. 163; *Mowers v. Fethers*, 61 N. Y. 35. "The liability of an innkeeper for the goods of his guest, has been settled for centuries. The act of 1855 does not purport to create it nor even to declare it. It assumes the liability. It

enacts that whenever the proprietors of a hotel shall provide a safe in their office for the keeping of money, jewels or ornaments, belonging to their guests and shall notify their guests thereof, and a guest shall neglect to deposit his money, jewels or ornaments therein, the proprietor shall not be liable for the loss of the same by his guest. This act assumes that before its passage, the innkeeper was liable for the loss of the money, jewels or ornaments of his guest. It assumes that he still remains liable, if a deposit is made by the guest of his money or jewels according to the terms of the act. It neither enlarges or restricts the liability of the innkeeper. It leaves it as the common law fixes it, with the condition as to money and jewels, that if a particular notice is given by the innkeeper, the liability shall not attach unless such money and jewels are deposited in the office safe. . . . The liability stands therefore as the common law fixed it." Hunt, C., in *Wilkins v. Earle*, 44 N. Y. 172.

Q. A who was a warehouseman agreed for a certain compensation to permit B to store a quantity of goods in A's warehouse. A assured B that his goods would be guarded day and night. The goods were stolen by men in charge of the building. A brings action against B. Can he recover? State the relation between the parties.

A. Yes. The relation existing between the parties was that of bailor and bailee, and as the bailee was a warehouseman, he ought to have used reasonable diligence in watching B's goods, and as they were stolen by men in care of the warehouse, A is liable. *Jones v. Morgan*, 90 N. Y. 4.

Q. A stored goods in B's warehouse at the agreed price of \$50 a month. The goods were seized under and by virtue of an action in replevin against A. Is B liable to A?

A. No. A bailee for hire may excuse himself for a failure to deliver the property to the bailor when called for, by showing that the property was taken out of his custody under the authority of a valid legal process, and that within a reasonable

time he gave notice of that fact to the owner. *Bliven v. R. R.*, 36 N. Y. 403; *Roberts v. S. S. Co.*, 123 N. Y. 57.

(NOTE.) Warehousemen are liable for losses occasioned by innocent mistakes on their part in delivering goods to those not entitled to receive them. *Bank of Oswego v. Doyle*, 91 N. Y. 32.

Q. A pledged with B two diamond studs. B placed one of the studs in his safe, and the other he wore in his necktie. Thereafter the stud in the safe was stolen, and subsequently thereto the one in the tie was also stolen. A demands the return of the diamonds, and upon B's failure to deliver them, brings suit. Can he recover?

A. He cannot recover as to the one stolen from the safe, but may recover as to the one stolen from the tie. A pawnbroker or bailee is only liable for ordinary diligence, and where his place of business is broken into, and articles pledged are stolen therefrom, he is not liable if he exercised ordinary diligence. *Abbett v. Frederick*, 56 How. Pr. 68. "Jewels held in pawn may be worn, if the pawnee takes care not to lose or injure them, the pawnee being liable for any loss through theft or otherwise which might happen in the wearing, for the pawn is so far in the nature of a depositum, that it can be used but at the peril of the pawnee." *Sheridan v. Presas*, 18 Misc. 180; *Lawrence v. Maxwell*, 53 N. Y. 19.

Q. A leaves his horse in first class condition with B to board, at the agreed price of \$20 per month, telling B that he is not to use the horse, and is only to give him such exercise as can be given with a halter; B does not heed these instructions and allows his wife to drive the horse, as a result of which the animal becomes foundered. When A finds this out, he refuses to pay board any longer for the horse and abandons him as utterly worthless. What action will A bring, and what will be the measure of damages?

A. A can sue in conversion, the measure of damages being the value of the horse. A bailee for hire who uses the prop-

erty contrary to instructions of the bailor, is liable for a conversion thereof. *Collins v. Bennett*, 46 N. Y. 490.

(NOTE.) Gratuitous bailment is defined by Allen, J., in *Bank v. Bank*, 60 N. Y. 295, as follows: "The defendant was a gratuitous bailee, that is a depository without compensation for the benefit of the bailor, and was therefore only liable for gross negligence, which is defined in various ways. What constitutes gross negligence, that is such want of care, as would charge a gratuitous bailee for loss, must depend very much upon the circumstances to which the term is to be applied. It has been defined to be the want of that ordinary diligence and care which a usually prudent man takes of his own property of the like description.

Q. A places 100 crates of eggs for cold storage in the X Cold Storage Warehouse. The Warehouse Company negligently permitted the supply of ice to run short so that the temperature rose and the eggs were spoiled. A brings action against the Company to recover damages sustained. Judgment for whom and why?

A. Judgment for A. "A Cold Storage Warehouse Company, in the absence of an express agreement, impliedly undertakes to maintain the necessary temperature required for the preservation of property stored with it by its customers for the time the property remained stored; if its stock of ice is insufficient for that purpose, it should either replenish it or give timely notice to the customer to remove the property; if it fails to do either, in the absence of circumstances charging the customer with knowledge of the situation, the Company is liable for the damages resulting from the failure to maintain the requisite temperature." *Sutherland v. Albany Cold Storage Co.*, 171 N. Y. 269; *Wilson v. Linde Co.*, 47 App. Div. 327.

Q. A delivered seven bales of muskrat skins to the N. Y. Cold Storage Company in good condition, and the company undertook to preserve such skins in their then condition, for which it was to receive the usual compensation. The company gave a warehouse receipt which provided: "That perishable goods are received only at the owner's risk." Through

the negligence of the Storage Company, the skins were badly damaged. A brings action for the damages sustained. Can he recover?

A. Yes. "It is urged that the warehouse receipt which provided that 'perishable goods are received only at the owner's risk,' limits and measures the defendant's liability; but we are clearly of opinion that the law is established in this state that such a provision does not exempt the defendant from liability for its own negligence . . . the cases are uniform in holding that, in the absence of express and unequivocal language extending to negligence, such a clause does not exempt a bailee for hire from discharging the duty he holds to use reasonable care." Woodward, J., in *Herzig v. N. Y. Cold Storage Co.*, 115 App. Div. 40, aff'd in 190 N. Y. 511.

Q. A delivered to B, a tailor, 1,000 yards of cloth which B agreed to make into trousers at \$1.00 per pair. He makes and delivers 250 pairs. He afterwards makes but refuses to deliver the rest of the trousers until he is paid for all. A tenders at the rate of \$1.00 per pair for the last lot, and sues for the return of the cloth. Give the nature of the transaction. Who is entitled to the cloth?

A. The nature of this transaction is a bailment, and title to the goods, though in a manufactured form, remains in the bailor A; but B has the right to a lien for his services on the goods in his possession, even though he delivered a part of them to A. *Morgan v. Congdon*, 4 N. Y. 552.

Q. A makes a contract with B whereby he (A) agreed to bind 1,000 books at the rate of fifty cents a book, and deliver them in lots of a third at a time. The first two lots had been delivered, and A had not demanded or received any pay. A then refuses to deliver any more books until the whole amount is paid. What are the rights of the parties?

A. "Where deliveries of property are made, under a single contract by the owner to another, at different times, for the

purpose of having work done thereon which adds to its value, a lien in favor of the person doing the work, attaches to all the property in the same manner as if it had been delivered at the same time; and if a part is voluntarily returned without payment for the work, the workman retains his lien for all the work done on the property which remains in his possession. The only effect of the return is a release of so much of the securities. The transaction is merely a bailment, and the bailee can retain the rest of the property till the whole debt is paid." *Morgan v. Congdon*, *supra*; *Scott v. Delehanty*, 65 N. Y. 128.

Q. A takes some gold to B, a jeweler, who agrees to make it into a chain for \$100, the money to be paid thirty days after the completion and delivery of the chain. When the chain is completed, A demands it of B, but the latter refuses to give it up until he gets his pay, claiming a lien. Rights of A and B? State your reasons.

A. A has an absolute right to the chain. The agreement to deliver in this case before receiving payment, is inconsistent with the retention of the lien, and therefore B is estopped from setting it up. "Where a particular time of payment is fixed by the contract, which is or may be subsequent to the time when the owner is entitled to a return of the property, there can be no lien." *Wiles Laundering Co. v. Hahlo*, 105 N. Y. 234.

Q. A delivered to B, a bookbinder, 1,000 books to be bound at \$1 each. Five hundred of the books were bound and delivered by the binder to A without exacting payment. The remaining 500 books were bound by B, and then pledged by him to C, as security for a loan of \$500. C refused to deliver the books to A upon demand. A consults you. What is the nature of the transaction, and what are the respective rights of A, B, and C under the circumstances?

A. This is a bailment, and title to the books is in A, subject, however, to B's lien for the work done upon them. B having a lien could pledge the same, and C acquired all B's rights to retain the books until the entire amount due upon them was

paid by A. *Wiles Laundering Co. v. Hahlo*, *supra*, a leading case.

Q. A brings a wagon to B for repairs. It is worth \$25 when taken. B repairs the wagon, increasing the value thereof to \$100. C has a judgment against B, and offers A \$25 for his interest in the wagon. A refuses to accept it. C then levies on the wagon, and sells it under the judgment against B. A brings action against C. Can he recover, and what is the extent of the recovery?

A. Yes. The owner of property, who delivers it to another for the purpose of having work done thereon, or other work which adds to its value, does not thereby lose his title to the property; therefore he may recover as damages from one who has converted the property the value thereof at the time of the conversion. Anything affixed to one's property becomes a part of that property, and title to it passes to the owner; therefore, A can recover the value of the property when taken. *Pierce v. Schenck*, 3 Hill, 28.

Q. A buys an overcoat for \$50, and takes it to a furrier, who agrees to furnish furs and line it for \$50. After the furrier has completed the job and the coat is ready for A, C, a creditor of the furrier, levies on the coat. A sues C in conversion alleging \$100 damages. To whom does the coat belong? If judgment for A, for how much?

A. The coat belongs to A and judgment should be for \$100. The title to the completed article vests by accession in the party who furnished the original article; in such case the materials added became the property of A. "Where materials are furnished by one, and labor is to be performed upon it by another, and the identical article produced is to be returned to the employer who paid a compensation for the labor, the contract is one of bailment, though the manufacturer or workman may have furnished some accessorial material." *Merrill v. Johnson*, 7 Johns. 473.

Q. A delivered to B for safe-keeping certain bank stocks with instructions that they should not be delivered to anyone, except upon written order of A. A's wife called for them and B delivered the bank stocks to her, although she did not have a written order for them. A then demanded the bank stocks from B, who refused to deliver them, justifying his refusal upon the ground that he had delivered them to A's wife. A brings action against B. Judgment for whom and why?

A. Judgment for A. "Where a bailor instructs bailee not to deliver his property to any person except upon his written order, a delivery to the wife of the bailor without such order, is not equivalent to a delivery to the husband, and does not discharge the bailee from liability." *Kowing v. Manly*, 49 N. Y. 192.

Q. A hired an automobile from B for one month for a given price. At the end of the month, A failed to return the automobile to B, although requested to do so, and three days thereafter it was destroyed by fire without any fault of A. B sues A for the value of the automobile. Judgment for whom and why?

A. Judgment for B; it was A's duty to return the automobile at the expiration of the time for which he had hired it. "It is obvious that the bailee whatever the character of the bailment may be, when its purpose has been fully satisfied and performed, is bound upon request to redeliver the thing bailed to its lawful owner." *Ouderkirk v. Bank*, 119 N. Y. 267.

Q. A delivered goods to B, a warehouseman. C, the rightful owner of said goods, brings an action against B who is compelled to pay \$500 damages, their value. A demands the goods from B, who refuses to deliver them. A sues B. Can he recover?

A. No. The rule that a bailee cannot deny the title of his bailor, does not apply to a case where the bailee has been com-

pelled by legal process to pay for the property to one having the true title. *Cook v. Holt*, 48 N. Y. 275.

(NOTE.) “A factor is bound to assume that his principal is the owner of goods consigned to him for sale and his allegiance is alone due to his principal. He cannot justify a refusal to pay over the proceeds of such sale, upon the ground that the same have been seized by virtue of an attachment against a third person or that they have been paid over in pursuance of an order in proceedings supplementary to execution, in an action against such third person of which the principal had no notice.” *Barnard v. Kobbe*, 54 N. Y. 516.

CHAPTER III

Bills and Notes

Q. (No date.)

Three months after date, I promise to pay to the order of X, \$500 in wheat. (Signed) A. B. Is this a valid promissory note?

A. This is not a valid promissory note, as it is not payable in money. Section 20 of the N. Y. Neg. Inst. Law (Consolidated Laws, chap. 38) provides as follows: "An instrument to be negotiable must conform to the following requirements: 1. It must be in writing and signed by the maker or drawer. 2. Must contain an unconditional promise or order to pay a sum certain in money. 3. Must be payable on demand, or at a fixed or determinable future time. 4. Must be payable to order or to bearer; and 5. Where the instrument is addressed to a drawee, he must be named or otherwise indicated therein with reasonable certainty." If this instrument were negotiable, it would be payable thirty days from its delivery, as where an instrument is not dated, it will be considered to be dated as of the time when it was issued. Section 36, part 3, Neg. Inst. Law (Consolidated Laws, chap. 38). The absence of a date from an instrument does not affect its negotiability. Section 25, part 1, Neg. Inst. Law (Consolidated Laws, chap. 38). *Brown v. Bank*, 6 Hill, 443. The note may be written in pencil.

Q. June 2, 1905.

I promise to pay to the order of W \$55 at my store, or in goods on demand. (Signed) T. P. Is this a valid promissory note?

A. Yes. This instrument has all the essential qualities of a negotiable promissory note. It is for the unconditional payment of a certain sum of money at a specified time to the

payee's order. It is not optional with the maker to pay in money or goods, and thus to fulfill his promise in either of two specified ways. In such case, the promise would have been in the alternative. If the holder chooses, he may surrender the note and receive goods, but that rests entirely with himself, and no choice is left with the debtor. *Hostatter v. Wilson*, 36 Barb. 307; *Hodges v. Shuler*, 22 N. Y. 114. The statute has left this rule unchanged. Section 24 of Neg. Inst. Law (Consolidated Laws, chap. 38) provides as follows: "An instrument which contains an order or promise to do any act in addition to the payment of money is not negotiable. But the negotiable character of an instrument is not affected by a provision which: 4. Gives the holder an election to require something to be done in lieu of payment of money."

Q.

May 1, 1915.

Pay A or order \$1,000 out of the rents which you will collect from my building 265 Broadway. To B. (Signed) C. Is this a good bill of exchange?

A. Clearly not, as it is payable out of an uncertain fund. The test is, whether the drawee is confined to the particular fund, or whether though a particular fund is mentioned, the drawee may charge the bill to the general account of the drawer if the designated fund turns out to be insufficient. It must appear that the bill is drawn on the general credit of the drawer; though it is no objection when so drawn that a particular fund is specified from which the drawer may reimburse himself. *Munger v. Shannon*, 61 N. Y. 251; *Brill v. Tuttle*, 81 N. Y. 457; *Schmittler v. Simon*, 101 N. Y. 554. The statute has not changed the law in this respect. Section 22 of Neg. Inst. Law says: "An unqualified order or promise to pay is unconditional within the meaning of this chapter, though coupled with: 1. An indication of a particular fund out of which reimbursement is to be made, or a particular account to be debited with the amount; or 2. A statement of the transaction which gives rise to the instrument. But an order or promise to pay out of a particular fund is not unconditional."

Q. A indorsed for the accommodation of B the latter's promissory note for \$1,000, payable sixty days after date. The note was complete in form, except as to date and place of payment. A told B to date the note May 1, at the First National Bank, Boston. B, in fraud of his instructions, dated the note April 1, and made it payable at the Chemical Bank, New York City, and then negotiated it in due course to C, who now sues A and B thereon. The above facts appearing, judgment for whom and why?

A. Judgment for C. "It is well-settled law, that if one affixes his signature to an incomplete promissory note and intrusts it to the custody of another for the purpose of having the blanks filled up, and thus becoming a party to a negotiable instrument, he thereby confers the right, that such instrument carries on its face an implied authority to fill up the blanks and complete the contract at pleasure as to name, terms, amount, date and place of payment, so far as consistent with its words. As to all purchasers for value without notice, the person to whom a blank note is intrusted must be deemed the agent of the signer, and the act of perfecting the instrument must be deemed the act of the principal. An oral agreement between such principal and agent, limiting the manner in which the note shall be perfected, cannot affect the rights of an indorsee who takes the note before maturity for value in ignorance of such an agreement." *Van Duzer v. Howe*, 21 N. Y. 531; *Redlich v. Doll*, 54 N. Y. 234; *Weyerhouser v. Dunn*, 100 N. Y. 150. Section 33 of Neg. Inst. Law is a substantial re-enactment of this rule and is as follows: "Where the instrument is wanting in any material particular, the person in possession thereof has a prima facie authority to complete it by filling up the blanks therein. And a signature on a blank paper delivered by the person making the signature in order that the paper may be converted into a negotiable instrument operates as a prima facie authority to fill it up as such for any amount. In order, however, that any such instrument, when completed, may be enforced against any person who became a party thereto prior to its completion, it must be filled up strictly

in accordance with the authority given and within a reasonable time. But if any such instrument, after completion, is negotiated to a holder in due course, it is valid and effectual for all purposes in his hands, and he may enforce it as if it had been filled up strictly in accordance with the authority given and within a reasonable time."

Q. A gives a note to B, of which the following is a copy.

Buffalo, N. Y., Jan. 15, 1915.

Sixty days after death, I promise to pay to B \$5,000 for value received. (Signed) A. B is the son of A, and after A's death sues the personal representatives of A for the amount of the note. Can he recover?

A. Yes. A bill or note payable so many days after the death of a party is certain as to time, because the time is sure to arrive. *Carnright v. Gray*, 127 N. Y. 92; *Hegeman v. Moon*, 131 N. Y. 462. The Neg. Inst. Law, sec. 23, is to the same effect and is as follows: "An instrument is payable at a determinable future time, within the meaning of this chapter, which is expressed to be payable: 1. At a fixed period after date or sight; or 2. On or before a fixed or determinable future time specified therein; or 3. On or at a fixed period after the occurrence of a specified event, which is certain to happen, though the time of happening be uncertain. An instrument payable upon a contingency is not negotiable, and the happening of the event does not cure the defect." It will be noticed in this case that the instrument is not negotiable, as it does not contain words of negotiability. In *Carnright v. Gray*, supra, which was decided under the revised statutes, it was held that such an instrument carries with it a presumption of consideration. In the case of *Deyo v. Thompson*, 53 App. Div. 9, it was held that the Neg. Inst. Law, sec. 50, has repealed the provision of the Rev. Stat., and that the presumption of consideration extends only to negotiable instruments; that non-negotiable instruments do not import a consideration, and the burden is upon the party suing upon such a note, to prove the existence of consideration therefor by extrinsic evi-

dence. And so also *Kinsella v. Lockwood*, 79 Misc. 619; *Kerr v. Smith*, 156 App. Div. 807.

Q. A gave to B a note of which the following is a copy.

New York, May 1, 1914.

I promise to pay to the order of B, \$500 on his twenty-first birthday. Value received. (Signed) A. B, for value received, indorsed the note to C. On June 10, 1915, when B attained the age of twenty-one years, C then demanded payment of the note from A, and on A's refusal to pay the same brought suit. What defense, if any, has A?

A. This is not a valid promissory note as the payment was conditioned upon the attainment of B's majority, an event which might never have happened. It was made dependent upon a contingency and therefore lacked one of the essential elements of a promissory note, which is that the money shall be payable at a time certain. The agreement to pay must not depend on any contingency but be absolute and at all events. *Duffield v. Johnston*, 96 N. Y. 369; *Carnright v. Gray*, 127 N. Y. 92; *Rice v. Rice*, 43 App. Div. 458.

Q. A's clerk made out a check payable to a fictitious person. A signed the check, not knowing that the payee was a fictitious person. The clerk then indorsed the name of the fictitious person upon the check, and presented it to the bank for payment. The bank paid the amount of same and charged it to A's account. A sues the bank. Can he recover?

A. Yes. The rule that paper made payable to the order of a fictitious person is treated as payable to bearer, applies only to instruments put in circulation by the maker with knowledge that the payee does not represent the name of a real person. "The maker's intention is the controlling consideration which determines the character of such paper. It cannot be treated as payable to bearer unless the maker knows the payee to be fictitious, and actually intends to make the paper payable to a fictitious person." *Shipman v. Bank*, 126 N. Y. 318; *Philips v. Bank*, 140 N. Y. 557; *Seaboard Nat.*

Bank v. Bank of America, 193 N. Y. 26. Section 28 of Neg. Inst. Law reaffirms this rule and is as follows: "The instrument is payable to bearer: 1. When it is expressed to be so payable; or 2. When it is payable to a person named therein or bearer; or 3. When it is payable to the order of a fictitious or nonexistent person and such fact was known to the person making it so payable; or 4. When the name of the payee does not purport to be the name of any person; or 5. When the only or last indorsement is an indorsement in blank."

Q. A drew a bill of exchange leaving the name of the drawer blank; addressed it to himself and then wrote an acceptance across it. He placed it in his desk, and then left the office. While he was absent, B came in and stole the paper. B then filled it up with the drawer's name, and transferred it to C, a bona fide holder. C sues A upon the instrument. Can he recover?

A. No. "The rule that a bona fide holder of an incomplete instrument, negotiable, but for some lack capable of being supplied, has an implied authority to supply the omission and to hold the maker thereon, only applies where the latter has by his own act or by the act of another, authorized, confided in, or invested with apparent authority by him, put the instrument into circulation as negotiable paper. Where an instrument is stolen, a bona fide holder, in such a case, acquires and can convey no title." *Ledwich v. McKim*, 53 N. Y. 307; *Davis Co. v. Best*, 105 N. Y. 59. Section 34 of Neg. Inst. Law is in accord with this rule. It is as follows: "Where an incomplete instrument has not been delivered, it will not, if completed and negotiated, without authority, be a valid contract in the hands of any holder, as against any person whose signature was placed thereon before delivery."

Q. A gives B, his agent, authority to issue negotiable paper. B issues a note signing his own name as maker. Subsequently the instrument comes into the hands of C, who takes it for value before maturity and without notice. C sues A on the note. Is A liable?

A. Clearly not. It is a well-settled rule in the law of commercial paper, that persons taking negotiable instruments are presumed to take them on the credit of the parties whose names appear upon them, and a person not a party to the instrument cannot be charged with liability thereon, upon proof that the ostensible party signed as his agent. *Pentz v. Stanton*, 10 Wend. 271; *Briggs v. Partridge*, 64 N. Y. 363; *Bank v. Gallaudet*, 120 N. Y. 298. Section 37 of Neg. Inst. Law, conforms to this rule, and is as follows: "No person is liable on the instrument whose signature does not appear thereon, except as herein otherwise expressly provided. But one who signs in a trade or assumed name will be liable to the same extent as if he had signed in his own name."

Q. Buffalo, N. Y., May 1, 1915.

Three months after date for value received, we promise to pay to the order of C, \$500 with interest at the First National Bank.

(Signed) A, Pres.
B, Treas.

A and B were president and treasurer respectively of the X Ice Company, duly authorized to issue notes for the corporation, and it was business paper. The bank had no notice of the transaction, except what was on the face of the paper. The bank had previously discounted the note, and now sues A and B individually. Are they liable? Give your reasons.

A. Yes. This is not the note of the corporation, but merely the note of the officers A and B. The words "president and treasurer" are purely descriptive. "Where a negotiable promissory note has been given for the payment of a debt contracted by a corporation, and the language of the promise does not disclose the corporate obligation, and the signatures to the paper are in the names of individuals, a holder, taking bona fide, and without notice of the circumstances of its making is entitled to hold the note as the personal undertaking of its signers, notwithstanding they affix to their names the title of an office. Such an affix will be regarded as descriptive of the

persons and not of the character of the liability. Unless the promise purports to be by the corporation, it is that of the persons who subscribe to it; and the fact of adding to their names an abbreviation of some official title has no legal significance as qualifying their obligation, and imposes no obligation upon the corporation whose officers they may be. This must be regarded as the long and well-settled rule." Gray, J., in *Casco Nat. Bank v. Clark*, 139 N. Y. 307. See also *Bank v. Wallis*, 150 N. Y. 455; *Bank v. Love*, 13 App. Div. 551.

(NOTE.) Section 39 of Neg. Inst. Law provides as follows: "Where the instrument contains or a person adds to his signature words indicating that he signs for or on behalf of a principal, or in a representative capacity, he is not liable on the instrument if he was duly authorized; but the mere addition of words describing him as an agent, or as filling a representative character, without disclosing his principal does not exempt him from personal liability."

Q. A, a creditor, has dealings with B, as agent of C, which A knows. B buys goods as agent which A is aware of. B gives A a note for the price, signed "B, agent for C." Whose note is it and against whom can it be enforced?

A. In this case, the principal would be liable to A. Where the names of both principal and agent appear on a negotiable instrument, in such a manner as to render it doubtful to whom credit was given, parol evidence is admissible between the original parties to the instrument, and others affected with notice, to remove the doubt. "Where individuals subscribe their names to a note, prima facie they are personally liable, although they add a description of the character in which the note was given; but such presumption of liability may be rebutted by proof that the note was in fact given by the makers as agents of a principal, or officers of a corporation for a debt of the principal or corporation due to the payee, and that they were duly authorized to make such note as agents or officers." *Brockway v. Allen*, 17 Wend. 40; *Baird v. Baird*, 145 N. Y. 659; *Higgins v. Ridgeway*, 153 N. Y. 130. And the statute (sec. 39 of Neg. Inst. Law, *supra*) has not changed this rule, as in the case of *Megowan v. Peterson*, 173 N. Y. 1,

where the court says: "We do not understand that the statute to which we have alluded (sec. 39) was designed to change the common-law rule in this regard, which is to the effect that, as between the original parties and those having notice of the facts relied upon as constituting a defense, the consideration and the conditions under which the note was delivered may be shown."

Q. A is the executor of an estate, and gives the ordinary promissory note for goods purchased for the estate, and signs "A, executor." The note is negotiated in due course to C. C sues A personally on the note. Is A liable?

A. Yes. The addition of an official character to the signatures of executors and administrators, in signing instruments and executing contracts has no significance, and operates merely to identify the person and not to limit or qualify the liability. *Pinney v. Admrs.*, 8 Wend. 500; *Pumpelly v. Phelps*, 40 N. Y. 59; *Schmittler v. Simon*, 114 N. Y. 177.

Q. A delivered to B a certain paper and asked him (B) to sign same, telling him that it was an order for some goods that had been ordered. The paper was in fact a negotiable promissory note. B signed the paper without examining it. It was subsequently negotiated, and came into the hands of C, a bona fide holder for value and without notice. When the note became due, C presented the same to B, who refused to pay. C brings action against B. Judgment for whom and why?

A. Judgment for C, as B was negligent in signing a paper which he had an opportunity to read, and C, being a holder in due course, is entitled to recover. Anyone having the opportunity and the power to ascertain, with certainty, the exact obligation he is assuming, yet chooses to rely upon the statements of the person with whom he is dealing, and executes a negotiable instrument without reading or examination, he is bound to a holder in due course. The theory is that he is guilty of laches in signing the instrument without reading it. He thereby places in circulation what appears to be, on its

face, a valid promise to pay. The purchaser of this promise in the open market, for value, is entitled to rely upon the facts which are shown upon the face of the instrument. *Chapman v. Rose*, 56 N. Y. 137; *Dutchess Ins. Co. v. Hatchfield*, 73 N. Y. 229; *Marden v. Dorthy*, 160 N. Y. 67.

Q. A forges B's name as maker to a promissory note. It comes into the hands of C, a holder in due course. B refuses to pay the same, and C brings action against him. Can he recover?

A. Clearly not. As the note had no valid inception, it could not be made valid by subsequent negotiation. The rule that a forged instrument cannot be validated has long been well settled, and is re-embodied in sec. 42 of Neg. Inst. Law, which is as follows: "Where a signature is forged or made without authority of the person whose signature it purports to be, it is wholly inoperative, and no right to retain the instrument, or to give a discharge therefor, or to enforce payment thereof against any party thereto, can be acquired through or under such signature, unless the party, against whom it is sought to enforce such right, is precluded from setting up the forgery or want of authority." *Salen v. Bank*, 110 App. Div. 636; *Trust Co. v. Suden*, 120 App. Div. 518.

Q. A gives his note to B for a debt which he owes B. Upon suit on the note by B, A defends on the ground of no consideration. Judgment for whom and why?

A. Judgment for B. While in a simple contract, this would not be held to be a sufficient consideration, yet under the Neg. Inst. Law, sec. 51, it would be a good consideration. This section provides as follows: "Value is any consideration sufficient to support a simple contract. An antecedent or pre-existing debt constitutes value; and is deemed such whether the instrument is payable on demand or at a future time." *Button v. Rathbone Co.*, 118 N. Y. 666; *Mindlin v. Appelbaum*, 62 Misc. 300.

(NOTE.) "Absence or failure of consideration is matter of defense as against any person not a holder in due course; and partial failure of consideration is a defense *pro tanto* whether the failure is an ascertained and liquidated amount or otherwise." Sec. 54 of Neg. Inst. Law.

Q. X and Y for their mutual accommodation made and exchanged their promissory notes for equal amounts. X discounted Y's note at the Z Bank, but the same was not paid at maturity. Y, however, sues X on the latter's note, and X sets up failure of consideration as a defense. Judgment for whom and why?

A. Judgment for Y. "Upon an exchange of promissory notes, each note is a valid consideration for the other and is fully available in the hands of its holder. The transaction is in no sense executory, but is fully consummated, and no agreement is to be implied save that expressed in the papers. The fact, therefore, that one of the notes is not paid at maturity, does not sustain a defense of failure of consideration in an action upon the other." *Rice v. Grange*, 131 N. Y. 149.

Q. A makes a note for the accommodation of B. B transfers it for value to C. C, at the time of taking the note, knew that A was only an accommodation party. C sues A on the instrument. Can he recover?

A. C can recover. It has been held before the statute (*Grocers' Bank v. Penfield*, 69 N. Y. 502) that where a promissory note is made for the accommodation of the payee, without restrictions as to its use, an indorsee taking it in good faith for value can recover thereon against the maker. Section 55 of Neg. Inst. Law is very explicit upon this point. It is as follows: "An accommodation party is one who has signed the instrument as maker, drawer, acceptor or indorser, without receiving value therefor, and for the purpose of lending his name to some other person. Such a person is liable on the instrument to a holder for value, notwithstanding such holder at the time of taking the instrument knew him to be only an accommodation party." *Bank v. Toblitz*, 81 App. Div. 593, *aff'd* in 178 N. Y. 596.

Q. A purchased some goods of B, and gave his promissory note in payment therefor. B refused to take the note of A unless he had a good indorsement thereon. A went to the X Manufacturing Co., Inc., who to accommodate A indorsed said note. B had the note discounted at the Y Bank. Upon maturity of the said note, the same not being paid, the bank seeks to hold the X Manufacturing Company for the amount of the note. Can they do so?

A. No. A corporation engaged in manufacturing has no power to indorse notes for the accommodation of another, and cannot bind itself thereby. As the bank discounted the note before maturity, it cannot hold the manufacturing company liable. Corporations as a general rule cannot bind themselves as accommodation parties. National and state banks, railroad companies and other corporations have been held unable to bind their shareholder's property by accommodation indorsements. *Bank v. Bank*, 16 N. Y. 125; *Nat. Park Bank v. G. A. M. W. & S. Co.*, 116 N. Y. 281; *Bank v. Snyder M'fg Co.*, 117 App. Div. 371.

Q. A, the cashier of the X Bank, sent to the Y Bank to be discounted, a bill of exchange payable to the order of "A, cashier," indorsed by him with the same addition to his signature. The Y Bank sues the X Bank as indorser on the bill. Judgment for whom and why?

A. Judgment for the Y Bank. It was uniformly held before the statute, that circumstances such as these, imported that the indorsement was that of the bank in the regular course of business, and not that of the cashier individually. *Bank of Genesee v. Patchin Bank*, 19 N. Y. 312; *Bank v. Bank*, 29 N. Y. 619; *Bank v. Hall*, 44 N. Y. 395. Section 72 of Neg. Inst. Law has preserved this rule. It is as follows: "Where an instrument is drawn or indorsed to a person as "cashier" or other fiscal officer of a bank or corporation, it is deemed *prima facie* to be payable to the bank or corporation of which he is such officer; and may be negotiated by either the indorse-

ment of the bank or corporation, or the indorsement of the officer."

Q. A, holder of a note on which there are six indorsements, strikes out the second and third. Thereafter he sues X and Y who are the fourth and fifth indorsers respectively on the note, the same having been dishonored. Can he recover? State the rule.

A. No. Section 78 of Neg. Inst. Law answers this question. It is as follows: "The holder may at any time strike out any indorsement which is not necessary to his title. The indorser whose indorsement is struck out, and all indorsers subsequent to him, are thereby relieved from liability on the instrument."

Q. A gives to B his promissory note for \$500, payable in thirty days to B's order. The note is procured through fraud. B transfers the note for value without indorsement to C. Thereafter C gets notice of the fraud and gets B to indorse the note. C then sues A on the note. Can he recover? Give reasons.

A. C cannot recover. A subsequent indorsement made after notice of the maker's defense to the instrument, although the paper was transferred for value without notice of the defense, will not relate back to the time of the transfer so as to cut off the equities of the maker against the payee. *Goshen Nat. Bank v. Bingham*, 118 N. Y. 349. This rule continues in effect under sec. 79 of Neg. Inst. Law, which reads: "Where the holder of an instrument payable to his order transfers it for value without indorsing it, the transfer vests in the transferee such title as the transferor had therein, and the transferee acquires, in addition, the right to have the indorsement of the transferor. But for the purpose of determining whether the transferee is a holder in due course, the negotiation takes effect as of the time when the indorsement is actually made." See *Meurer v. Phenix Nat. Bank*, 42 Misc. 341; *Rivenbaugh v. First Nat. Bank*, 103 App. Div. 64.

Q. A makes a note to B or order. It is duly indorsed by B, C, D and E, the last indorsing it over to B, the original holder. Default and due notice, etc. B sues the maker and all indorsers. Advise all parties.

A. B cannot recover against C, D and E. B's rights against them as last indorsers are merged in his liability as first indorser to them. This rule prevents circuity of action, and is stated in sec. 80 of Neg. Inst. Law as follows: "Where an instrument is negotiated back to a prior party, such party may, subject to the provisions of this chapter, reissue and further negotiate the same. But he is not entitled to enforce payment thereof against any intervening party to whom he was personally liable."

Q. A gives a negotiable note to B for \$35. Subsequently a demand arises in favor of A against B for \$30. B transfers the note before maturity for value and without notice to C. C sues A on the note. A sets up a counterclaim against C which he has against B. C demurs. Judgment for whom and why?

A. The demurrer must be sustained. C is a holder in due course, and the counterclaim which would have been available against B, cannot be set up against him. This old rule is now contained in sec. 96 of the Neg. Inst. Law. It is as follows: "A holder in due course holds the instrument free from any defect of title of prior parties and free from defenses available to prior parties among themselves, and may enforce payment of the instrument for the full amount thereof against all parties liable thereon." See *Hargen v. Wilson*, 63 Barb. 237; *Huff v. Wagner*, 63 Barb. 215; *Todd v. Shelbourne*, 8 Hun, 512; *Knox v. Eden Musee Co.*, 148 N. Y. 441.

Q. C was indebted to B for coal, and indorsed to him certain promissory notes payable to C's order before maturity, made by D in payment of tobacco sold by C to D. B entered C's account with the full face value of the notes, including the accrued interest thereon. The notes were not paid at

maturity. B sues D, the maker. D answers and admits the making of the note, transfer and nonpayment thereof, and sets up affirmatively a breach of the contract of sale of the tobacco by C, for which the notes were given, and claims damages therefor to the amount of the notes as a set-off. B demurs to the answer. Judgment for whom and why?

A. Judgment for B. B is a holder in due course, and therefore the defenses are not available against him under sec. 96 of Neg. Inst. Law. That B is a holder in due course will be seen from sec. 91, which is as follows: "A holder in due course is a holder who has taken the instrument under the following conditions: 1. That it is complete and regular upon its face. 2. That he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such was the fact. 3. That he took it in good faith and for value. 4. That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it."

Q. A made and delivered his promissory note to B for value received. B indorsed the same in blank and left it in his desk. C, his clerk, stole the note and then negotiated it before maturity and for value to D who had no knowledge of the theft. At maturity of the note it was duly presented for payment and payment thereof refused, of which B received due notice. Shortly thereafter D sold the note to E for value without notice. The maker (A) having become insolvent, E sues B on the note. Judgment for whom and why?

A. Judgment for E. D having been a holder in due course, and E having been a bona fide purchaser from him succeeded to all his rights. D as a holder in due course could recover from B, due notice of the nonpayment by the maker having been given to him (B); therefore E standing in the position of an assignee, acquired all D's rights and remedies. "A purchaser for value of negotiable paper after maturity is not a bona fide purchaser to the extent of being protected in his

purchase against the rightful owner, from whom it has been stolen, unless he has succeeded to the rights of a bona fide holder before maturity. The burden is upon the purchaser in such a case to show that he is, or has succeeded to the rights of, a bona fide purchaser before maturity; there is no presumption that the thief negotiated the paper before it became overdue." *Bank v. Kidder*, 106 N. Y. 221. See also *Bank v. Bank*, 42 App. Div. 151. Section 98 of Neg. Inst. Law continues this rule and is as follows: "Every holder is deemed prima facie to be a holder in due course; but when it is shown that the title of any person who has negotiated the instrument was defective, the burden is upon the holder to prove that he or some person under whom he claims acquired the title as a holder in due course. But the last mentioned rule does not apply in favor of a party who became bound on the instrument prior to the acquisition of such defective title." See *Engle v. Hyman*, 54 Misc. 251.

Q. A makes his promissory note payable to the order of B. B transfers it for value before maturity to C, who takes it without notice of the fact that B had procured the note through fraud. C after maturity of the instrument indorsed it to D who takes with notice. D sues A upon the note. Can he recover?

A. Yes. D, the indorsee, steps into the shoes of his indorser C, and as C was a holder in due course, and took the instrument free from all defenses, D succeeds to his rights. As C so held the note, his title and rights thereto were such, that they could not be defeated by A. In the transfer, the title and rights held by him passed to D. The notice which D may have had of the fraud in the original transaction does not defeat the rights he acquired by the transfer. One reason of the rule is obvious. The maker of the note would be liable to the transferrer; his condition is made no harder by the note coming into the hands of one having notice of its infirmities. *Bank v. N. Y. B. & P. Co.*, 148 N. Y. 189. Section 97 of Neg. Inst. Law continues this rule, and is as follows: "In the hands of

any holder other than a holder in due course, a negotiable instrument is subject to the same defenses as if it were non-negotiable. But a holder who derives his title through a holder in due course, and who is not himself a party to any fraud or illegality affecting the instrument, has all the rights of such former holder in respect of all parties prior to the latter."

Q. A note is usurious in its inception. It is transferred to A for value without notice before maturity, and there is nothing on the face of the note showing usury. Can A recover from the maker?

A. No. Usury has always been considered a real defense in this state, and no recovery is allowed on the instrument even by a holder in due course. The rule is well stated by Vann, J., in *Clafin v. Boorum*, 122 N. Y. 385, as follows: "The loan when made was a violation of the statute, and the notes were thus rendered absolutely void, and no subsequent transaction could make them valid. Even if, as the plaintiffs claim, they purchased the notes before maturity for value and without notice, they cannot enforce them, because the vice of usury follows a promissory note into the hands of a bona fide holder. A note, void in its inception for usury, continues void forever, whatever its subsequent history may be. It is as void in the hands of an innocent holder for value as it was in the hands of those who made the usurious contract. No vitality can be given to it by sale or exchange, because that which the statute has declared void cannot be made valid by passing through the channels of trade."

Q. A makes his promissory note to B for \$500 in payment for a usurious loan. B before maturity discounts the note at the X Bank. The bank has no notice of the facts. The note not being paid at maturity, the bank brings suit against A who sets up usury as a defense. Judgment for whom and why?

A. Judgment for the bank. The note in question was void as between the original parties thereto, and would have con-

tinued void *in the hands of any individual* to whom it might have been transferred; but an exception is made in the case of a bank by the Banking Law (Laws of 1900, chap. 310, sec. 1). "Promissory notes void for usury as between the original parties are nevertheless valid and enforceable when discounted by a state bank for value before maturity in the due course of business without notice of their usurious inception." *Schlessinger v. Gilhooley*, 189 N. Y. 1.

Q. X gives to Y a promissory note for \$1,000 which is void for usury. Y goes to the Z National Bank and discounts the note through its cashier who has full knowledge of the usury. Upon X's failure to pay the note when due, the bank brings action against him. Can the bank recover?

A. No. "National and state banks are entitled to protection in the purchase of negotiable paper only in so far as the officers of such banks act in good faith and not where they knowingly and intentionally join with wrongdoers in an attempt to evade the laws. Where therefore a bank discounts promissory notes which are void for usury with full knowledge of the payment of an usurious rate of interest thereon, such usury may be pleaded as a defense to an action on the notes, and the provision of the Banking Law (Laws of 1900, chap. 310, sec. 1), modifying for the benefit of banking institutions the general statutes in relation to usury has no application." *Schlessinger v. Lehmaier*, 191 N. Y. 69. See also *Crusius v. Siegman*, 142 N. Y. Suppl. 349; *Armstrong v. Middaugh*, 74 Misc. 46.

Q. A negotiable promissory note not usurious in its inception, but subsequently becoming so, comes into the hands of A, a bona fide holder for value without notice. He sues the maker, who pleads the usury as a defense. State the rule governing the rights and liabilities of the maker and the owner of the note under the circumstances.

A. A can recover from the maker. The subsequent usurious transaction in nowise affects the maker, who has already be-

come bound upon the instrument. The subsequent negotiation of a note upon a usurious consideration cannot defeat an action thereon against the maker by the holder if the instrument had a legal inception. All subsequent transfers of a valid note are treated as so many sales of chattels, and any fraud or usury between intermediate parties, while they are defenses between those parties among themselves, are not available to the maker. *Cameron v. Chappell*, 24 Wend. 94; *Catlin v. Gunther*, 11 N. Y. 368.

(NOTE.) Where a note tainted with usury is exchanged by the holder thereof for a new note, he can recover upon the new note, providing, however, that he is a bona fide holder. *Kilmer v. O'Brien*, 14 Hun, 414; *Treadwell v. Archer*, 76 N. Y. 196.

Q. A is the maker of a note payable to bearer. The note is stolen by B. C acquires the same in good faith for value and before maturity, but does not make any inquiries of B. At the maturity thereof C presents the note for payment to A. A says that the note was stolen from him and refuses to pay. C sues A on the note. Can he recover?

A. Yes. It is elementary that a thief can convey good title to negotiable paper, although he cannot do so on the sale of a chattel. In order that a recovery can be had by the holder, he must have taken the instrument under such circumstances as to make him a holder in due course. He must have taken the instrument in good faith; mere negligence will not defeat a recovery. "He is not bound at his peril to be on the alert for circumstances which might possibly excite the suspicion of wary vigilance; he does not owe to the party who puts the paper afloat the duty of active inquiry in order to avert the imputation of bad faith. The rights of the holder are to be determined by simple tests of honesty and good faith, and not by a speculative issue as to his diligence or negligence. The holder's rights cannot be defeated without proof of actual notice of the defect in title, or bad faith on his part evidenced by circumstances. Though he may have been negligent in taking the paper, and omitted precautions which a prudent

man would have taken, nevertheless, unless he acted *mala fide*, his title, according to settled doctrine, will prevail." O'Brien, J., in *Cheever v. R. R.*, 150 N. Y. 59. Section 95 of the Neg. Inst. Law is in full accord with this statement of the rule, and is as follows: "To constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated, must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith." See also *Bank v. Kellog*, 183 N. Y. 92.

(NOTE.) The distinction between real and personal defenses is called attention to. It still exists under the Neg. Inst. Law. A person whose title is defective must be distinguished from one who has no title at all, and who can confer none, as, for example, where one takes title through a forged indorsement. Section 94, defining defective title, is as follows: "The title of a person who negotiates an instrument is defective within the meaning of this chapter when he obtained the instrument, or any signature thereto, by fraud, duress, or force and fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud."

Q. A indorses a note to B, with which to pay a certain other note in the X Bank. A is not liable on the first note. B goes to the cashier of the X Bank and states the facts to him, but says that he wishes to have the note discounted so that he might pay still another note, and that he will pay the one then due within a few days. B paid the note as agreed. The discounted note was not paid when due, and the X Bank sues A upon the note. Judgment for whom and why?

A. A is not liable. The bank was informed of the facts, and therefore took with notice; having done so it does not occupy the position of a holder in due course, and therefore cannot recover. *Nickerson v. Ruger*, 76 N. Y. 279; *Seymour v. McKinstry*, 106 N. Y. 240; *Brant v. Walsh*, 145 N. Y. 502.

Q. A acquires a check in due course drawn upon the X Bank by B. As a matter of fact B's signature is a forgery, but A is ignorant of the fact. A has the X Bank certify the check.

Later A presents the check for payment, and the bank refuses to honor it. In an action by A against the bank, the latter sets up forgery as a defense. State the rights of the parties.

A. The bank is liable. "Where a check is certified by a bank upon which it is drawn, the certification is equivalent to an acceptance." Section 323 of Neg. Inst. Law. "For more than a century it has been held without question, that it is incumbent upon the drawee of a bill to be satisfied that the signature of the drawer is genuine, that he is presumed to know the handwriting of his correspondents, and if he accepts or pays a bill to which the drawer's name has been forged, he is bound by the act, and can neither repudiate the acceptance nor recover the money paid." Allen, J., in *Nat. Park Bank v. Ninth Nat. Bank*, 46 N. Y. 77. See also *Lynch v. Bank*, 107 N. Y. 179; *Title G. & T. Co. v. Haven*, 196 N. Y. 493.

Q. A drew a check on the X Bank payable to B. B lost the check, and the finder thereof forged B's name and negotiated it. It came into the hands of C, a holder in due course. C presents it to the bank which pays the same. The bank, upon discovering the above facts, sues to recover back the money paid on the check. What are the rights of the parties?

A. Judgment for the bank. It is well settled that where the indorsement of the payee of a check has been forged, subsequent holders obtain no title to it and payment made to one who holds under such forged indorsements may be recovered. "The drawee of a draft or check is supposed to know the signature of the drawer, but the same knowledge of the signature of an indorser is not imputable to him, and by acceptance or payment does not admit or guarantee the genuineness of the signature of the payee, and money so paid may be recovered back, on the ground that it was paid under a mistake of facts." *Holt v. Ross*, 54 N. Y. 472. See also *Corn Exchange Bank v. Nassau Bank*, 91 N. Y. 74; *Trust Co. v. Bank*, 127 App. Div. 517.

(NOTE.) "A bank by certifying a check in the usual form, simply certi-

fies to the genuineness of the signature of the drawer, and that he has funds sufficient to meet it, and engages that those funds will not be withdrawn from the bank by him; it does not warrant the genuineness of the body of the check as to payee and amount. Where a bank certifies a check, which has been altered by changing the date, name of the payee, and raising the amount, and subsequently pays the same, it may recover back the amount paid. The bank is not under a duty to take precautions against subsequent fraudulent alterations; it is the drawer who has control over its form." *Marine Nat. Bank v. Nat. City Bank*, 59 N. Y. 67. So also *White v. Bank*, 64 N. Y. 316; *Clews v. Bank*, 89 N. Y. 419; *Continental Bank v. Tradesmen's Bank*, 173 N. Y. 272. Section 112 of Neg. Inst. Law is in accord with this rule, and is as follows: "The acceptor by accepting the instrument engages that he will pay it according to the tenor of his acceptance; and admits: 1. The existence of the drawer, the genuineness of his signature, and his capacity and authority to draw the instrument; and 2. The existence of the payee and his then capacity to indorse."

Q. A signed a note as surety, and underneath his name wrote "Utica, N. Y." At maturity the note was not paid, and the notary who protested it, knowing A's residence and place of business was at Rome, N. Y., mailed the notice of protest to A, 22 Railroad Ave., Rome, N. Y. A never received it. Is A liable? Why?

A. Yes, because he signed as surety. The undertaking of A was not conditional like that of an indorser, nor was it upon any condition whatever. It was an absolute undertaking that the note should be paid by the maker at maturity. When the maker failed to pay, A's contract was broken, and the plaintiff had a complete right of action against him. It was no part of the agreement that the plaintiff should give notice of the nonpayment, nor that he should sue the maker, or use any diligence to get the money from him. The point was decided long ago that the undertaking of a surety on a note like the one in question is not conditional, but an absolute undertaking that the maker will pay the note when due. *Allen v. Rightmere*, 20 Johns. 365; *Brown v. Curtis*, 2 N. Y. 225. Section 113 of Neg. Inst. Law has not changed this rule, and is as follows: "A person placing his signature upon an instrument otherwise than as maker, drawer or acceptor is deemed to be an indorser, unless he clearly indicates by appropriate

words his intention to be bound in some other capacity." Under this section, however, there is no reason why one should not bind himself as guarantor or surety to a holder in due course, if he clearly indicates such an intent. As the place where the notice was sent does not affect A's liability in this case, he being a surety and as such not entitled to notice, the question of notice will be discussed in the answer to a subsequent question in this chapter.

Q. A is the holder of an instrument payable to bearer. The instrument, unknown to him, had been given upon a usurious consideration. He transfers the note to B for value by delivering it to him. B subsequently sues the maker and is defeated, the defense of usury having been set up. He then sues A. Can he recover? Answer fully.

A. No. "Where the holder of a promissory note which is tainted with usury, transfers the same for a valuable consideration without indorsement and without representations as to its legality, in the absence of knowledge on his part at the time of the transfer, of the defect, no warranty against it will be implied, and an action cannot be maintained against him for the loss sustained. A scienter is essential to establish a warranty as to the validity of the note." *Littauer v. Goldman*, 72 N. Y. 506. See also *Frank v. Lanier*, 91 N. Y. 112; *Buehler v. Pierce*, 70 App. Div. 621, *aff'd* in 175 N. Y. 266. Section 115 of Neg. Inst. Law, defining warranty, is as follows: "Every person negotiating an instrument by delivery or by a qualified indorsement, warrants: 1. That the instrument is genuine and in all respects what it purports to be; 2. That he has a good title to it; 3. That all prior parties had capacity to contract; 4. That he has no knowledge of any fact which would impair the validity of the instrument or render it valueless. But when the negotiation is by delivery only, the warranty extends in favor of no holder other than the immediate transferee."

Q. A made and delivered his promissory note to B. The latter forged C's name to an indorsement and then indorsed

same to D for value. D indorses before maturity to E for value by qualified indorsement in the usual form. When the note became due and was not paid E notified all those whose names appeared upon the note as indorsers; but finding out that C's indorsement was forged and that the others are irresponsible sues D. Can he recover?

A. Yes, as the transferrer of an instrument by qualified indorsement warrants that the instrument is genuine in all respects, what it purports to be, and that all the signatures thereon are genuine. In such cases scienter or knowledge is not necessary in order to hold the transferrer liable. *Whitney v. Bank of Potsdam*, 45 N. Y. 234; *Bell v. Dagg*, 60 N. Y. 528; Sec. 115 of Neg. Inst. Law, *supra*.

Q. A delivered to B, an infant, his certain promissory note for \$500. B indorses and transfers the same to C for value and before maturity. The note was protested for nonpayment and due notice given. C brings suit against A who defends on the ground that B, the infant, could not pass title to the note by his (the infant's) indorsement. Judgment for whom and why?

A. Judgment for C. It is provided by the Neg. Inst. Law, sec. 41, that the indorsement of an infant passes the property in the note to the indorsee. This section reads as follows: "The indorsement or assignment of the instrument by a corporation or by an infant passes the property therein, notwithstanding that from want of capacity the corporation or infant may incur no liability thereon."

Q. A, B and C are the respective indorsers on a promissory note for \$300. At maturity the note is not paid, and A pays it. A then sues B and C each for \$100 contribution, and offers in evidence a parol agreement made by A, B and C at the time of the indorsement that there should be contribution among them. Is the evidence admissible?

A. Yes. The indorsers can agree among themselves to

share the loss equally. The terms of the contract contained in instruments of this character which are within its scope to define and regulate, cannot be changed by parol; but the understanding between the indorsers is a distinct and separate subject, an outside matter, which may be properly proved independent of, and without any regard to the instrument itself. *Barry v. Ranson*, 12 N. Y. 462; *Easterly v. Barber*, 66 N. Y. 433; *Withrow v. Slayback*, 158 N. Y. 649. Section 118 of Neg. Inst. Law recognizes this rule, and is as follows: "As respects one another, indorsers are liable *prima facie* in the order in which they indorse; but evidence is admissible to show that as between or among themselves they have agreed otherwise. Joint payees or joint indorsees who indorse are deemed to indorse jointly and severally."

Q. A's name appears first as an indorser of a promissory note; B's name appears second on the same note. A, in a suit by the holder against him as first indorser, attempts to show that in reality B signed first, and that they agreed between themselves that B should be primarily liable. Can he show it?

A. No. While the evidence as we have seen would be admissible as between A and B, yet it cannot be admitted in a suit by the holder; as to him the indorsers are liable in the order in which they indorse, and also jointly and severally, and no evidence can be admitted to vary this liability. *Hubbard v. Gurney*, 64 N. Y. 457. Section 118 of Neg. Inst. Law only allows evidence to show that as between or among themselves they have agreed to become bound in a different capacity.

Q. A sold to B the right to make, use and sell a certain invention claimed by A to be patented, for which B gave to A his note as follows:

\$2,000.

New York, May 1, 1915.

Six months after date, I promise to pay to the order of A, two thousand dollars with interest at the Park National Bank of New York City. Given for a patent right. (Signed) B.

The note was transferred by the indorsement of A and came into the hands of C, a holder in due course. At the maturity of the note C presented the same for payment which was refused on the ground that A had procured the note through fraud and misrepresentation. C brings action against B. Conceding the above facts as stated, can C recover?

A. No. The Neg. Inst. Law, sec. 330, has made an exception to the general rule that fraud or misrepresentation is no defense to an action on a note by a holder in due course, where the instrument is given for a patent right, and which has the words "given for a patent right" prominently and legibly written or printed on the face of said note or instrument. The above section reads as follows: "A promissory note or other negotiable instrument, the consideration of which consists wholly or partly of the right to make, use or sell any invention claimed or represented by the vendor at the time of the sale to be patented, must contain the words 'given for a patent right' prominently and legibly written or printed on the face of such note or instrument above the signature thereto; and such note or instrument in the hands of any purchaser or holder is subject to the same defenses as in the hands of the original holder; but this section does not apply to a negotiable instrument given solely for the purchase price or the use of a patented article." *Herdie v. Roessler*, 109 N. Y. 127.

Q. A gives B his promissory note for good consideration, payable at the Mechanics' Bank, Troy, N. Y. On the day of payment B goes to the Bank and inquires if the note is paid. B does not protest the note, but goes to A's place of business, tells him that the note is not paid, and then and there demands payment of A. A refuses to pay. B brings suit on the note. Can he recover?

A. Judgment for B. It is not necessary to present the instrument, give notice of dishonor, or notice of protest in order to hold the maker liable. Section 130 of Neg. Inst. Law provides as follows: "Presentment for payment is not necessary in

order to charge the person primarily liable on the instrument; but if the instrument is, by its terms, payable at a special place, and he is able and willing to pay it there at maturity and has funds there available for that purpose, such ability and willingness are equivalent to a tender of payment on his part. But except as herein otherwise provided, presentment for payment is necessary in order to charge the drawer and indorsers." Protest is not necessary according to sec. 189, which is as follows: "Where any negotiable instrument has been dishonored it may be protested for nonacceptance or nonpayment, as the case may be; but protest is not required, except in the case of foreign bills of exchange. Notice of dishonor need not be given to the maker, but must be given to the drawer and indorsers in order to hold them liable. Section 160.

Q. A makes a note payable three months after its date at his bank. B indorses the same. The note falls due on Saturday, and the holder presents the note and protests it for nonpayment on that day. Both A and B set up the want of a legal demand and presentment. Is this defense good?

✓ A. The defense is good. Section 145 of Neg. Inst. Law provides as follows: "Every negotiable instrument is payable at the time fixed therein without grace. When the day of maturity falls upon Sunday, or a holiday, the instrument is payable on the next succeeding business day. Instruments falling due or becoming payable on Saturday are to be presented for payment on the next succeeding business day, except that instruments payable on demand may, at the option of the holder, be presented for payment before twelve o'clock noon on Saturday when that entire day is not a holiday." It will be noticed that this instrument was payable at a certain period after date, and not on demand, therefore presentment was not according to the statute, and hence of no effect.

Q. X is the maker of a promissory note. Y is an indorser who has a store in Buffalo where he resides. Z is a farmer into

whose hands the note has come in the regular course of business. On the day of maturity Z goes to X, and showing the note, asks for the money. X refuses to pay. Desiring to save notarial fees Z goes to Y's store the next day, and throwing the note down on the counter says: "There, X has refused to pay that note and I want you to do so." Y refuses; and in a few days thereafter, Z hears something of the necessity of notice of dishonor or protest. Has the indorser been discharged? Discuss fully.

A. No. The oral notice of dishonor given here is sufficient, according to sec. 167 of the Neg. Inst. law, which says: "The notice may be in writing or merely oral and may be given in any terms which sufficiently identify the instrument, and indicate that it had been dishonored by nonacceptance or non-payment. It may in all cases be given by delivering it personally or through the mails." The notice was given in the proper time. Section 174 provides: "Where the person giving and the person to receive notice reside in the same place, notice must be given within the following times: 1. If given at the place of the business of the person to receive notice, it must be given before the close of business hours on the day following; 2. If given at his residence, it must be given before the usual hours of rest on the day following; 3. If sent by mail, it must be deposited in the post office in time to reach him in usual course on the day following." Section 175 provides as follows: "Where the person giving and the person to receive notice, reside in different places, the notice must be given within the following times: 1. If sent by mail, it must be deposited in the post office in time to go by mail the day following the day of dishonor, or if there be no mail at a convenient hour on that day, by the next mail thereafter. 2. If given otherwise than through the post office, then within the time that notice would have been received in due course of mail, if it had been deposited in the post office within the time specified in the last subdivision."

Q. A was an indorser on a promissory note made by B,

discounted by the X Bank. The note was protested for non-payment, and notice thereof given by the bank, by depositing the same in the post office, properly addressed to A. A never received the notice, it having been stolen and destroyed before delivery by a dishonest post office employee. Because of its nonreceipt, A lost an opportunity of saving himself, and now claims that he is not liable as an indorser because he did not receive the notice. Is he liable? State the rule.

A. A is liable. Section 176 of Neg. Inst. Law, covers this point. It is as follows: "Where notice of dishonor is duly addressed and deposited in the post office, the sender is deemed to have given due notice, notwithstanding any miscarriage in the mails." Section 177 should also be noticed in this connection. It is as follows: "Notice is deemed to have been deposited in the post office when deposited in any branch post office or in any letter box under the control of the post office department."

Q. A, doing business in New York City, indorses in that city a promissory note which was dated and discounted there. His indorsement did not give specific directions as to where notice of dishonor should be sent, and the bank duly mailed notice to the street and number in Albany where A resided. A failed to get the notice in time, and thereby lost an opportunity of saving the debt. Is he liable on his indorsement, and why?

A. Yes. The notice was sent to the proper place according to the provisions of sec. 179 of Neg. Inst. Law, which says: "Where a party has added an address to his signature, notice of dishonor must be sent to that address; but if he has not given such address, then the notice must be sent as follows: 1. Either to the post office nearest to his place of residence, or to the post office where he is accustomed to receive his letters; or 2. If he live in one place, and have his place of business in another, notice may be sent to either place; or 3. If he is sojourning in another place, notice may be sent to the place

where he is so sojourning. But where the notice is actually received by the party within the time specified in this chapter, it will be sufficient, though not sent in accordance with the requirements of this section."

Q. A indorsed a note of B, and took back a chattel mortgage to secure him therefor. The note came into the hands of C, a bona fide holder except as to the mortgage. When the note became due, C relying upon the security held by A, failed and neglected to present the note and protest the same, which fact A sets up as a defense in an action against him. Judgment for whom and why?

A. Judgment for A. The taking of the chattel mortgage was not sufficient to dispense with notice. "The mere precaution by an indorser of taking security from his principal has never been adjudged to operate as a dispensation of regular demand and notice. There must be something more; such as the taking into his possession the funds or property of the principal, sufficient for the purpose of meeting the payment of the notes; or he must have an assignment of all the property, real and personal, of the maker for that purpose." *Spencer v. Hawery*, 17 Wend. 489; *Seacord v. Miller*, 13 N. Y. 58.

Q. A delivered his promissory note for value to B. C became the holder thereof in due course. Before maturity of the note, B, believing that A would be unable to meet the note, prevailed upon A to give him (B) an assignment of all his property. At the maturity of the note, A did not pay the same, and C still being the holder of the note, neglected to give B notice of presentment and nonpayment. Upon the above facts, can C recover from B?

A. Yes. It was held in all the early cases before the statute, that demand and notice were unnecessary where the indorser had taken a general assignment of the maker's property, upon the ground, that in such a case, the indorser had obtained everything which notice was intended to enable him to obtain. *Merchants' Bank v. Griswold*, 7 Wend. 165; *Kramer v. Sand-*

ford, 4 W. & S. 328; *Clift v. Rodger*, 25 Hun, 41. Section 186 of Neg. Inst. Law has not changed this rule; it is as follows: "Notice of dishonor is not required to be given to an indorser in either of the following cases: 1. Where the drawee is a fictitious person or a person not having capacity to contract, and the indorser was aware of the fact at the time he indorsed the instrument; 2. Where the indorser is the person to whom the instrument is presented for payment; 3. Where the instrument was made or accepted for his accommodation." See *Moore v. Alexander*, 63 App. Div. 100.

Q. A makes a promissory note payable to B. B indorses it to C. The note is not paid at maturity. C fails to give notice to B in proper time. B subsequently promises to pay the amount of the note, but thereafter when C demands payment he refuses to pay. C sues B. Can he recover? State the rule.

A. Yes. The rule is well stated in the case of *Ross v. Hurd*, 71 N. Y. 14, as follows: "Where an indorser of a promissory note who has been discharged from liability, by the failure of the holder to give notice of nonpayment, with full notice of the laches of the holder, unequivocally consents to continue his liability as though due protest has been made, he waives his right to object, and stands in the same position as if proper steps had been taken to charge him. The assent of the indorser to be bound may be established by any transaction between him and the holder which clearly indicates such intent. The assent, however, must be clearly established, and will not be inferred from doubtful or equivocal acts or language. A promise by an indorser to pay a note or bill, after he has been discharged by the failure to give him notice of its dishonor, will bind him, provided he had full knowledge of the laches when the promise was made. A promise made under these circumstances affords the clearest evidence that the indorser does not intend to take advantage of the laches of the holder, and the law without any new consideration moving between the parties gives effect to the promise." The statute

does not alter this rule, as will be seen from an examination of sec. 180 of Neg. Inst. Law, which is as follows: "Notice of dishonor may be waived, either before the time of giving notice has arrived, or after the omission to give due notice, and the waiver may be expressed or implied." See also *First Nat. Bank v. Gridley*, 112 App. Div. 398.

Q. A was the holder of a certain promissory note made by B, upon which C was an indorser. Before the note became due, C, the indorser, requested A, the holder, to extend the time of payment for two months longer. A agreed to do so provided C would allow his name to remain on the note as an indorser, which C did. At the maturity of the note A failed to present the note for payment or to give notice to C of nonpayment. At the end of the extended time, the note not having been paid, A brings action against C who defends on the ground that he was discharged as indorser, because he did not receive notice of dishonor, and that his assent to the extension of time of payment was without consideration. Judgment for whom and why?

A. Judgment for A, as the action of C amounted to a waiver. "The question, therefore, is whether the facts proven constituted a waiver of the indorser's right to a demand of payment and notice of nonpayment thereof. Now it is true that the indorser did not say in so many words, 'I waive demand of notice and nonpayment,' but when he asked that the time of payment be extended a year, he, in effect, requested that no demand of payment be made at maturity. That request, coupled with his promise to let his name remain on the note if the time of payment be extended, must, we think, be held to constitute in legal effect, a waiver of demand and notice of nonpayment." *Parker, J., in Cady v. Bradshaw*, 116 N. Y. 188.

Q. A and B, who were partners, indorse a promissory note made by X. X fails to pay the note at maturity, and the holder gives notice of dishonor to A only. The firm of A and B has been dissolved by mutual consent before the maturity

of the instrument, which fact the holder knew. The holder now sues B, A being irresponsible. B sets up the want of legal notice. Judgment for whom and why?

A. Judgment for the holder. The notice given to one partner binds his copartner, even though such notice be given after the dissolution of the firm. The implied agency of one partner for the other continues for this purpose after dissolution. *Hubbard v. Matthews*, 54 N. Y. 43. It is otherwise as to mere joint debtors, the notice to one not binding the other, unless he has express authority to receive the same. *Willis v. Green*, 5 Hill, 232. The statute continues these rules without change. Section 170 of Neg. Inst. Law says: "Where the parties to be notified are partners, notice to any one partner is notice to the firm even though there has been a dissolution." Section 171 of Neg. Inst. Law reads: "Notice to joint parties who are not partners must be given to each of them, unless one of them has authority to receive such notice for the others."

Q. A is an indorser on C's promissory note, which is overdue, and notice of protest has been served on both A and C. A requests the holder to proceed at once against the maker as he fears that in a short time C will be unable to pay. The holder neglects to do so, and C fails. The holder sues A and C on the note. Judgment for whom and why?

A. Judgment for the holder. If the indorser of an overdue note demands of the holder that he proceed against the maker, of whom the amount could then be collected, but who subsequently becomes insolvent, and the holder neglects or refuses to do so, the indorser is not discharged thereby. While it is true that the indorser occupies a position similar to that of a surety, he also has a separate liability, his duty being to take up the instrument when dishonored. *Trimble v. Thorn*, 16 Johns. 152; *Newcomb v. Hale*, 90 N. Y. 326.

Q. A is a bona fide holder of a note for one year, signed by B and C, apparently as joint makers, and does not know

that C is only surety for B. A extends the time of payment for another year on consideration that B give A a chattel mortgage as additional security. What are the rights and liabilities of C? State the general rule.

A. C is not discharged. The general rule is that any extension of time by a valid agreement will discharge the indorsers; and for this purpose the contract must be supported by a valid consideration. The reason commonly given for this rule is, that the position of the indorser or surety would be jeopardized by the extension of time, his rights and remedies being suspended thereby. *Cary v. White*, 52 N. Y. 138; *Smith v. Erwin*, 77 N. Y. 486. But in this case, as against A who was a holder in due course, B and C must be treated as joint makers, and one of them cannot be released by an extension of time to his joint maker. Where a person has signed as surety a joint and several promissory note, and it does not appear by the instrument itself that such relation existed, he may prove such facts by parol. Such proof does not tend to alter the contract; but this can only be shown in suits by the payee or others affected with notice, and not in a suit by a bona fide holder. *Hubbard v. Guernsey*, 64 N. Y. 457; *Shutts v. Fingar*, 100 N. Y. 559; *Brink v. Stratton*, 64 App. Div. 331.

(NOTE.) Section 201 of Neg. Inst. Law specifies cases in which a person secondarily liable is discharged. It is as follows: "A person secondarily liable on the instrument is discharged: 1. By any act which discharges the instrument; 2. By the intentional cancellation of his signature by the holder; 3. By the discharge of a prior party; 4. By a valid tender of payment made by a prior party; 5. By a release of the principal debtor, unless the holder's right of recourse against the party secondarily liable is expressly reserved; 6. By any agreement binding upon the holder to extend the time of payment or to postpone the holder's right to enforce the instrument, unless the right of recourse against such party is expressly reserved."

Q. A is the holder of a past due promissory note. By a binding agreement he allows C, the maker, three months' additional time in which to pay. D is an indorser for value upon the note before its maturity. Is he released by the agreement of A with C?

A. Yes. It is the duty of an indorser of a note to take it up upon its dishonor. The indorser, however, can only succeed to the rights of the holder; when he takes up the note he steps into the shoes of the holder, and would be bound by any agreement of the latter with the maker. Here, as the holder extended the time of payment, the extension being binding upon the indorser would tie up his hands for the period of the extension and thus impair his rights; and this according to the settled rule would discharge him from liability. *Green v. Bates*, 74 N. Y. 333.

Q. A gives his note to B, no interest being specified. B adds interest thereto and transfers the same for value before maturity to C, who takes it without notice. Can C enforce the note against A for principal and interest? Discuss fully.

A. No. C can, however, recover the amount of the principal, as he is a holder in due course. This was a material alteration according to sec. 206 of Neg. Inst. Law, which is as follows: "Any alteration which changes: 1. The date; 2. The sum payable, either for principal or interest; 3. The time or place of payment; 4. The number or the relations of the parties; 5. The medium or currency in which payment is to be made; or which adds a place of payment where no place of payment is specified, or any other change or addition which alters the effect of the instrument in any respect, is a material alteration." Before the enactment of the statute, a material alteration avoided and discharged the instrument, except as against the party who made or assented to the alteration. The alteration extinguished all remedies. *Benedict v. Cowden*, 49 N. Y. 396; *Dinsmore v. Duncan*, 57 N. Y. 581. The statute has mitigated the rigor of the common-law rule in favor of a holder in due course, and allows a recovery by him according to the original tenor of the instrument, as will be seen from sec. 205 of Neg. Inst. Law, which is as follows: "Where a negotiable instrument is materially altered without the assent of all parties liable thereon, it is avoided, except as against a party who has himself made, authorized or assented to the altera-

tion and subsequent indorsers. But when an instrument has been materially altered and is in the hands of a holder in due course, not a party to the alteration, he may enforce payment thereof according to its original tenor."

Q. A draws a check on the X Bank payable to B for \$200. He negligently leaves a blank space so that the amount is raised to \$2,000. The bank pays out this amount. A sues the bank for the amount it has overpaid. Can he recover?

A. No. While the general rule is that a bank may only pay out the funds of a depositor in the usual course of business and in conformity to his directions, and it is not entitled to charge to him any payments, except those made at the time when and to the person to whom, and for the amount authorized by him, and where a check properly drawn by the customer has been subsequently altered in a material point without his consent, even if done so skillfully as to defy detection on examination, the bank is responsible for an omission to discover the original terms and conditions thereof; yet where the maker has been negligent, he is estopped, and cannot recover. The question of negligence cannot arise unless the depositor has, in drawing his check, left blanks unfilled, or by some affirmative act of negligence has facilitated the commission of a fraud by those into whose hands the check may come. This doctrine has been recognized since the early English case of *Young v. Grote*, 4 Bing. 253, and followed in this state in *Crawford v. Bank*, 100 N. Y. 50; *Critten v. Chemical Nat. Bank*, 171 N. Y. 224.

(NOTE.) "The indorser of a promissory note, the amount of which has been fraudulently raised after indorsement, by means of a forgery, is not liable upon the instrument, in the hands of a bona fide holder, for the increased amount, because of negligence in indorsing the same when there were spaces thereon which rendered the forgery easy, though the note was complete in form. No liability on the part of the indorser for the amount of such a note, as raised, can be predicated simply upon the fact that such spaces existed thereon." *Nat. Bank of Albany v. Lester*, 194 N. Y. 461.

Q. A drew a certain check on the X Bank for \$1,000 and delivered the same to B for value, who indorsed it to C for

value. C had the X Bank certify it, all taking place in a reasonable time. The day after the certification, the X Bank fails. C consults you as to his rights and remedies on the check. A and B are both responsible. What would you advise him to do? Give your reasons.

A. C has no rights. Where the holder of a check presents the same to the drawee when due, and procures it to be certified instead of paid, it is as between him and the drawer and indorsers, treated as payment, and operates to discharge them from liability thereon. *First Nat. Bank v. Leach*, 52 N. Y. 350. Section 324 of Neg. Inst. Law continues this rule, and is as follows: "Where the holder of a check procures it to be accepted or certified the drawer and all indorsers are discharged from liability thereon."

Q. A draws his check for \$500 and has it certified at the bank. He thereafter delivers the same to B to whom he made the check payable. B within a reasonable time goes to the bank to present it for payment, but shortly before he reaches the bank, it closes its doors through insolvency. B sues A on the check. Can he recover?

A. Yes. Where a check is certified before delivery, it does not act as payment by the bank any more than an uncertified check, and therefore the loss must fall upon the maker. If the drawer on his own behalf or for his own benefit, has his check certified and then delivers it to the payee, if the bank fails the drawer is not discharged. *Freund v. Bank*, 76 N. Y. 352; *White v. Eiseman*, 134 N. Y. 101. The distinction must be drawn between certification by the maker of a check before delivery and certification by the payee or holder after delivery; it is only in the latter case that the maker is discharged. Section 324, *supra*. "The reason for the rule would seem to be that where the drawer procures the certification himself, the bank knows that the check has not been put into circulation, and the act is done for the benefit and at the instance of the drawer. The payee of the check has taken no part in the

certification and it is done without his knowledge. On the other hand, where the holder of a check presents it to the bank, procures its certification, he is the one that secures the transfer of the fund to his own account, and consequently the drawer is discharged." *Cullinan v. Union S. & G. Co.*, 79 App. Div. 411. See also *Meuer v. Bank*, 94 App. Div. 340.

Q. A, a resident of Ohio, borrows \$5,000 in New York City from B, a resident of that city, for use in Ohio. A note is given for security, dated at New York City, payable in Ohio. The legal rate of interest in Ohio is 10%, in New York 6%. Upon default, suit is brought in New York State, claiming interest at 10%. A sets up the defense of usury. What are the rights of the parties? What law governs?

A. A's defense must fail. It is well settled by the decisions in this state, that commercial paper executed in one state, and payable in another is governed by the law of the state in which it is payable. *Cutler v. Wright*, 22 N. Y. 472; *Bank v. Griswold*, 72 N. Y. 472; *Sheldon v. Haxtine*, 91 N. Y. 124.

Q. A gave to B his certain promissory note for \$500 payable on demand, and dated the same June 1, 1909. The note was duly transferred to C, a holder in due course. On June 10, 1915, C presented the note and demanded payment thereof, which A refused. C comes to you for advice. Can he recover?

A. No. The right to recover upon this note is barred by the Statute of Limitations, more than six years having elapsed before a demand of payment was made. A demand note is due immediately, and if payment is not demanded within six years, it is outlawed by the Statute of Limitations. *Herrick v. Wolverton*, 41 N. Y. 587; *Bank v. Zimmerman*, 185 N. Y. 217.

Q. A and B were the joint and several makers of a promissory note to the order of C, which was indorsed and transferred to D, a holder in due course. After six years when the note was outlawed by the Statute of Limitations, B without the

knowledge of A paid the interest thereon for six years, which D indorsed upon the note at the request of B. After one year the note not being paid, D brings suit against both A and B. A sets up the defense of the Statute of Limitations. Judgment for whom and why?

A. Judgment for A. Part payment by one of several joint makers of a promissory note barred by the Statute of Limitations does not take it out of the statute as to the others; and this whether such payment is made before or after the debt has been barred. In order to take it out of the statute, it must be done with the authority of the others. The existence of a common liability of several for a debt does not of itself make each the agent of the others to bind them by part payment. *Van Keuren v. Parmelee*, 2 N. Y. 523; *Shoemaker v. Benedict*, 11 N. Y. 177; *Murdock v. Waterman*, 145 N. Y. 55.

Q. On June 1, 1905, A made and delivered his promissory note payable three months after date to the order of B. In June, 1915, an action on said note is brought by B's executors (B having died), and A pleads the Statute of Limitations. B's executors produce the note upon which there is indorsed by B in the latter's writing a part payment of the said note. No other evidence is produced, and both sides move for judgment. Judgment for whom and why?

A. Judgment for A. The part payment and the indorsement thereof were made at a time when they would not work against the interest of B, therefore if they were not made with the privity of A, they could not be used as evidence against him. "In order to make an indorsement upon a promissory note of part payment made by the holder, without the privity of the maker, competent as evidence to meet the defense of the Statute of Limitations, it must appear that it was made at the time when its operation would be against the interest of the party making it; and so, at least, that it was made before the statute could have operated." *Reed v. Hurd*, 7 Wend.

409; *Hulbert v. Nichol*, 20 Hun, 459; *Mills v. Davis*, 113 N. Y. 243.

Q. A commenced a civil action against B in which an order of arrest was granted. B, desiring to be released, gave his promissory note to A upon condition that A would consent to the discharge of B. A then transferred the note to C, a holder in due course. The note not being paid when due, C brought an action thereon against B, who defended. At the trial C produced the note, proved the amount due thereon and rested. B then showed that the note was given as a condition for his discharge from arrest, and rested. Both then moved for judgment. Judgment for whom and why?

A. Judgment for B. "A note given as a condition of consenting to the discharge of a party from arrest in a civil action is void as between the parties, and as to all others, except bona fide holders for value. A person claiming to be a bona fide holder of such a note must show under what circumstances, and for what value he became such; the mere production of the note is insufficient." *Douai v. Lutzens*, 21 App. Div. 254, aff'd in 165 N. Y. 622.

Q. The A Express Company issued certain bonds payable to bearer. While B held the bonds, they were stolen, and thereafter they came into the hands of C, a holder in due course. B commences an action of conversion against C. Can he recover?

A. No. "Bonds issued by a joint-stock company payable to bearer, unless the holder prefers to have them registered, in which case they are not to be transferred, except on the books of the company, and also coupons attached thereto payable to bearer, are negotiable." *Hibbs v. Brown*, 112 App. Div. 214, aff'd in 190 N. Y. 167. The principle of negotiability is in the instrument having a circulating credit and in its being transferable by indorsement and delivery, or by delivery merely. To import into the general rule a term or an element of duty, which requires of a purchaser taking in good faith

and for value, that he investigate the bona fides of the title of previous holders in the chain of title would be inconsistent with the feature or quality of negotiability. There is no middle term between negotiability and non-negotiability, and if, before acquiring a good title to negotiable instruments, it would be necessary for a person to make inquiry of every one in the regular chain of bona fide holders, as the appellant would have it, in order to be assured of his having an undisturbed current of authority to fill in the name of a payee, where would be the negotiability? The theory of negotiable instruments, and of their currency from hand to hand like bank notes, rests upon the proposition that they appear to belong to the person having them in possession and to no one else." Gray, J., in *Bank v. Bank*, 171 N. Y. 58.

Q. Certain bonds of the G Mining Company, negotiable by indorsement only, were made payable to A and duly delivered to him. Thereafter and before maturity A sells the bonds to B indorsing the same in blank on delivering them. Later they were stolen from B's safe. The thief erased the indorsement of A and sold the bonds to C, impersonating A and indorsing A's name on the bonds. C paid full value for the bonds before maturity and had no notice of the facts. B brings an action of conversion against C. Judgment for whom and why?

A. Judgment for B. "Where a thief or finder of negotiable paper, payable to order, which has been indorsed and put in circulation by the payee, erases the indorsement, and subsequently, personating the payee, forges his signature and transfers the paper to a bona fide purchaser for value, no title passes as against the true owner. In such case the purchaser does not take from an apparent owner, nor does he rely upon what appears upon the paper, but he relies upon, and is deceived by the representations of the wrongdoer; against such deception the rules applicable to negotiable paper are not intended to protect." *Colson v. Arnot*, 57 N. Y. 253. See also *Manhattan Savings Inst. v. N. Y. Nat. Exch. Bank*, 170 N. Y. 58.

CHAPTER IV

Carriers

Q. What is a common carrier, and what are his duties?

A. A common carrier is one, who undertakes for hire to transport the goods of all who choose to employ him. It is the duty of every common carrier to receive for carriage, and carry the goods of any person tendered to it for transportation, provided they are such as it holds itself out as willing to carry, and the party tendering them offers to pay its proper charges. *Fish v. Clark*, 2 Lans. (N. Y.) 176. Such a duty is attached to every person or corporation who becomes a common carrier, and under it no carrier can refuse to accept goods of any customer, except for just cause, nor can any carrier afford to one shipper facilities not granted to another under same circumstances. A special contract to carry need not be shown. Mere delivery and acceptance, imply a contract to carry. Delivery is a sufficient consideration for the undertaking to carry. 5 *Amer. & Eng. Ency. of Law* (2d Ed.), 158.

(NOTE.) "In the absence of evidence to the contrary, it is to be assumed that goods accepted by a carrier for transportation are taken under the responsibility cast upon the carrier by the common law, save as modified by the statute. If the goods are lost under circumstances which render the carrier liable by the general rule of law, he must respond unless he can show that there was a special acceptance equivalent to a contract, which exempts him from the ordinary liability of common carriers in the particular case." *Park v. Preston*, 108 N. Y. 434.

Q. Is a sleeping-car company a common carrier? A, a traveler, upon retiring for the night to his berth in a sleeping car, places under his pillow \$500, which is stolen by a thief. A sues the company. Can he recover?

A. No. It is well settled that a sleeping-car company is

not a common carrier. There is, however, an obligation on its part, to exercise reasonable care and vigilance over the persons and property of its passengers, especially while they are sleeping. The company is bound, and it is its right to preserve order and enforce proper decorum, as well as to keep reasonable watch over the persons and property of its passengers. *Welch v. R. R.*, 16 Abb. Pr. (N. S.) 352. "Money necessary for the payment of expenses of a journey undertaken, which is carried in the trunk of a passenger, is part of his baggage, and if lost while in the custody of the carrier, it is liable. But carriers do not undertake to safely carry and deliver the effects of passengers not delivered into their custody, and it cannot be held that money in a passenger's clothing worn during the day, and placed under his pillow at night, is in the custody of a corporation which carries and furnishes travelers with berths in sleeping coaches." *Carpenter v. R. R.*, 124 N. Y. 53.

Q. A delivered certain live stock to the X R. R. Co. to be transported over its road. By reason of a strike by the railroad employees and the violence of the strikers, the company was unable to deliver the stock within a reasonable time, although they forwarded them immediately after the strike was over. A sues for damages caused by the delay. Can he recover?

A. No. The strike and the violence of the strikers was an inevitable accident, and the company is excused. "In the absence of a special contract there is no absolute duty resting upon a railroad carrier to deliver the goods intrusted to it within what, under ordinary circumstances, would be a reasonable time. Not only storms, and floods and other natural causes may excuse delay, but the conduct of men may also do so. An incendiary may burn down a bridge, a mob may tear up the tracks or disable the rolling stock, or interpose irresistible force or overpowering intimidation. The only duty resting upon the carrier, not otherwise in fault, is to use reasonable efforts and due diligence to overcome the obstacles thus interposed, and to forward the goods to their destination." *Geisner v. R. R.*, 102 N. Y. 563.

(NOTE.) The common carrier's liability is absolute. The carrier is an insurer of the safety of the goods. It is liable for all loss, except that caused by the "act of God," "public enemy," or some "inherent defect in the goods." *Merritt v. Earle*, 29 N. Y. 117. The "act of God" signifies the violence of nature, such as storms, earthquakes, and unprecedented floods, not caused by any human intervention. To relieve the carrier from liability, the "act of God" must be the sole and immediate cause of the loss. Unprecedented floods of such magnitude, that the ordinary safeguards provided by the carrier are wholly insufficient to withstand their effects, are within the term "act of God," and the carrier is not liable for a loss resulting from a cause, unless it appears that his own want of care was the proximate cause of the loss. *McPadden v. R. R.*, 44 N. Y. 478.

Q. A purchases a ticket for passage on one of the trains of the N. Y. C. R. R. Co., from New York to Chicago, expecting to reach the latter place within twenty-four hours as stated by the time-table of the company. By reason of a severe snow-storm, the train is delayed for two days, and A does not reach his destination before that time. A brings action against the company for damages caused by the delay. Can he recover?

A. No. The snowstorm was an inevitable accident for which the company was not responsible. "A common carrier is not an insurer as to the time when passengers will reach their destination, in the absence of an express contract on the subject. If a railroad company negligently fails to keep the time it promises, it will be liable in damages for the injury thereby occurring to a passenger. But to entitle the plaintiff to recover there must be proof of negligence. Neither time-table nor advertisement is a warranty of punctuality. A snow-storm of such severity that it delays trains, although the railroad company made strenuous efforts to clear the tracks, must be classed as an act of God, and proof of its occurrence and effect, constitute a complete defense to the claim of a passenger for damages by reason of being delayed thereby." *Cormack v. R. R.*, 196 N. Y. 442.

Q. A entered into a contract with B, whereby he agreed to transport from New York to St. Louis, Mo., and safely deliver in thirty days, certain goods at a certain price. A ex-

pected to transport the goods by way of a canal in Pennsylvania. In consequence of an unusual freshet, this canal was not navigable, and the goods were detained for fifteen days, and did not arrive in St. Louis until twenty days after the time specified in the contract. B sues A for breach of contract. The latter sets up as a defense that the delay was caused by the "act of God." Can B recover?

A. Yes. If a carrier undertakes by special contract to deliver goods at the point of destination at a fixed time, it is bound to do so, and is liable for failure to do so within the prescribed time. Inevitable accident, or the "act of God" is no defense. *Harmony v. Bingham*, 12 N. Y. 99.

Q. A makes an agreement with a railroad company, whereby in consideration of a reduced rate, he releases the company from all claims for any damage or injury, "from whatsoever cause arising." He shipped some goods with the said railroad company. The goods are lost through the negligence of the company. A sues the company. Can he recover?

A. Yes. "While it is settled in New York, that a common carrier can stipulate against liability for loss resulting from his own negligence by special agreement, yet the contract will not be construed as exempting the carrier from liability for negligence, unless it is expressed in unequivocal terms. In this case, the exemption did not specifically include a loss arising from the carrier's negligence, and for such loss it must be held liable." *Maynard v. R. R.*, 71 N. Y. 180.

Q. A ships goods by the N. Y. C. R. R. Co., and agrees to limit the amount of the company's liability for loss to an amount not exceeding \$5,000. The goods are lost, and A sues the company for \$10,000 which he alleges is the actual value of the goods. The company sets up the agreement as a defense. Judgment for whom, and for how much?

A. Judgment for A for \$5,000. "Where the shipper of property enters into a contract with a carrier, whereby it is stip-

ulated that the event of loss or injury resulting from causes which would make the carrier liable, the liability shall be limited to an amount not exceeding a valuation specified, the shipper in case of loss or injury, can recover no more than the sum specified." *Zimmer v. R. R.*, 137 N. Y. 460.

Q. A was a passenger on the D., L. & W. R. R. While seated in the train, he gave his baggage checks to the agent of the D Express Company, to have the baggage sent to his residence in New York. He received in return therefor a printed receipt which contained a statement limiting the liability of the company to \$100. The car at the time was so dark that he could not read the printed matter, and he therefore did not do so. The express company fails to deliver. A sues the company for \$500, the value of the baggage. Can he recover and how much?

A. Yes, he can recover \$500. The nature of the transaction was not such as would make the passenger believe that the receipt contained a contract. "Where a railroad passenger in a dimly lighted car receives a receipt for baggage on which a contract is printed in fine type so as not to be easily read by a passenger; if he fails to see it, he is not bound by its terms." *Blossom v. Dodd*, 43 N. Y. 264.

(NOTE.) Where a traveler, on delivery of baggage to a local express company, receives a paper, which he has a right to regard as a receipt to enable him to follow and identify his property, and no notice is given him that it embodies the terms of a special contract, his omission to read the paper is not negligence, and he is not bound by its terms. There must be notice either actual or constructive. The notice "read this ticket," etc., must be printed in large type at some conspicuous place on the ticket, so as to be easily read, in order to charge the party receiving it with constructive notice. *Madan v. Scherard*, 73 N. Y. 329. "It is incumbent upon a shipper to acquaint himself with the contents of a contract executed by him, and although he fails to do so, will be held chargeable with knowledge thereof. The cases where parties proposing to have articles of property transported by a carrier, deliberately enter into some necessary contract relating to the transportation, differ materially from those cases of travelers who commit their trunks or articles of baggage to an agent of some express or transportation company, and receive at the moment some paper which, as has been

said, amounts simply to a voucher enabling them to follow and identify their property. There is a distinction between contracts of shipments of merchandise, and such contracts as local express companies endeavor to force upon travelers. While a carrier may limit its liability by express contract, the burden rests upon it to show that the passenger assented to the terms of such receipt." *Grossman v. Dodd*, 63 Hun, 324, *aff'd* in 137 N. Y. 599; *Springer v. Westcott*, 166 N. Y. 117.

Q. A makes an oral agreement with a railroad company in regard to shipping goods. After the goods were shipped, and on the same day, the company gave him a bill of lading containing conditions not in the oral agreement. The goods are lost under such conditions that the bill of lading does not cover the loss. A sues the company. Can he recover?

A. Yes. "Where goods are shipped under a verbal agreement for the transportation thereof, such agreement is not merged in a bill of lading, partly written and partly printed, delivered to the shipper after he has parted with the control of his goods, although such bill of lading by its terms limited the liability of the carrier, and expressed on its face that by accepting it, the shipper agreed to the conditions. The mere receipt of the bill, after the verbal agreement had been acted upon, and the shippers omitting through inadvertence, to examine the printed conditions, are not sufficient to conclude him from showing what the actual agreement was under which the goods had been shipped." *Bostwick v. R. R.*, 45 N. Y. 712.

Q. A shipped his trunk by the N. Y. C. R. R. Co., in New York City for Albany, and the next day called for the trunk at Albany. It could not be found. A sues the company, proves delivery to the company, the contract, the demand and value. The company does not offer any evidence. Judgment for whom and why?

A. Judgment for A. Nondelivery or delivery in bad condition of goods is *prima facie* evidence of negligence. If another than plaintiff is not named as consignee, plaintiff's evidence that the carrier's contract was made with himself, is sufficient proof of his title. Therefore, here A's evidence establishes

his title, and the company's negligence, and he must recover. *Canfield v. R. R.*, 93 N. Y. 532.

Q. A ships goods to B by railroad from Troy to Rochester. The goods arrive safely and properly at Rochester. The railroad company notifies B to take the goods. B fails to do so, and the railroad stores the goods in one of its warehouses. A week later the goods are destroyed by fire without negligence on the part of the railroad. At the trial on the above facts, both sides move for judgment. On what ground did the plaintiff base his motion? On what ground did the defendant base his motion? What did the court say?

A. The ruling of the court must have been, that the sole question involved was whether or not one week was a reasonable time for the consignee to remove the goods. "The duty of a common carrier by railroad as to the delivery of goods at the place of destination, is subject to the following rules: If the consignee is present upon their arrival, he must take them without unreasonable delay. If he is not present, but lives at or in the immediate vicinity of the place of delivery, the carrier must notify him of their arrival, and he then has a reasonable time in which to remove them. If he is absent, unknown, or cannot be found, then the carrier can place them in his freight house, and if the consignee does not call for them in a reasonable time, the liability as common carrier ceases. If the consignee has a reasonable opportunity to remove them and does not, he cannot hold the carrier as an insurer." *Fenner v. R. R.*, 44 N. Y. 505. See also *Falkner v. Hart*, 82 N. Y. 413.

(NOTE.) "What constitutes a reasonable time cannot be measured by any arbitrary or inflexible rule, but depends upon the circumstances of each case, and if the facts are undisputed, it is a question of law for the courts to determine. After the liability of the railroad company as a common carrier ceases towards the owner of the trunk checked by it, it still owes a duty to him, although its strict liability as a carrier has been changed to a modified liability, such as that of a warehouseman, and it can be charged with responsibility for the loss of the trunk, only on the ground that it was negligent, and failed as such warehouseman to discharge in full the duty it owed to the owner of the trunk." *Mortland v. R. R.*, 81 Hun, 473.

Q. A ships goods to B by the D., L. & W. R. R., to Elmira, N. Y. The company notifies B, who calls at the office at 5 P. M. on the day of arrival, and asks the company to keep the goods for him until the next morning, which the company agreed to do. A fire breaks out during the night, and the goods are consumed without any negligence on the part of the company. B sues the company for the value of the goods. Can he recover?

A. No. "When the consignee has notice of the arrival of his goods, and without any refusal or unwillingness on the part of the carrier to deliver, agrees with the latter for their mutual convenience, that the goods be left overnight in a freight house, the liability as a common carrier has ceased, and the goods being destroyed by fire during the night, the company cannot be held as an insurer." *Fenner v. R. R.*, *supra*.

Q. A, an inhabitant of Cairo, Ill., shipped goods by the Illinois Central to Byron Rogers, 50 Chambers Street, N. Y. City. At Buffalo, the New York Central, by its traffic arrangement with the Illinois Central, took the goods for the purpose of carrying them through to New York. By an error of the New York Central agents, the address became changed to Bryan and Rogers, and as the latter was an unknown firm in New York, after ten days, in which the railroad company tried to find the consignee, the railroad stored the goods with a reputable warehouse. The goods were subsequently destroyed by fire, through no fault of the bailee. The consignee wishes to bring suit for the value of the goods. Who would you sue?

A. The consignee has a right of action against the New York Central. "In the case of the transportation of property over several railroads, constituting a connecting line, neither company is the agent of the owner; each exercises an independent contract with the owner, and is responsible for its own negligence, and it cannot make the owner responsible for the negligence of a connecting road." *Sherman v. R. R.*, 64 N. Y. 254.

Q. A shipped certain goods to Buffalo by the X Railroad Company, and received a bill of lading which contained the provision that the goods were to be transported at the "owner's risk." Part of the goods were lost in transit through the negligence of the railroad company. A brings action against the railroad company. Can he recover?

A. Yes. A carrier is liable for the loss of goods occasioned through its negligence, although the goods were to be shipped at the "owner's risk." *Kenney v. R. R.*, 125 N. Y. 425.

Q. X, a swindler in Rome, N. Y., orders goods of the Y Company of Buffalo in the name of John Doe & Co., a fictitious firm. The Y Company ships the goods by the N. Y. C. R. R. Co. The railroad company delivers them to X, who absconds with the goods. The Y Company sues the railroad company. Judgment for whom and why?

A. Judgment for the Y Company. "Where a common carrier without requiring evidence of identity delivers goods to a stranger which have been fraudulently ordered by the latter in the name of a fictitious firm, which have been shipped in compliance with the order directed to the fictitious firm, the carrier is liable to the consignor for their value." *Price v. R. R.*, 50 N. Y. 213.

Q. A, a passenger on the Erie R. R. Co., finding no vacant seat in the ordinary car, entered the drawing-room car, which was not owned by the railroad company, and took a seat there. When called upon for an extra fare he refused to pay, but announced his willingness to go into another car if a seat were provided for him there. The porter of the drawing-room car forcibly ejected him. A sues the railroad company. Can he recover?

A. Yes. The railroad company is liable for the assault. "A railroad company cannot relieve itself of its obligations and liabilities as a common carrier of passengers, to those passengers who make use of the accommodations afforded by sleeping,

palace, or drawing-room cars. The porter of the drawing-room or sleeping car is, in the performance of the duties of the railroad company under its contract, the servant of that company, although it does not hire or pay the porter. A railroad company by the sale of a ticket for passage on its road, assumes the obligation, and undertakes absolutely to protect the passenger against any injury from negligence or willful misconduct of its servants while performing its contract. Whatever may be the motive which incites the servant to commit an unlawful or improper act towards the passenger, during the existence of the relation of carrier and passenger, the carrier is liable for the act, and its natural and legitimate consequences." *Thorpe v. R. R.*, 76 N. Y. 402. See also *Dwinelle v. R. R.*, 120 N. Y. 117.

Q. A, a passenger on a street railway car, is struck by the conductor of said car without provocation on A's part. A sues the company for damages. The company defends, on the ground that the act of the conductor was malicious, and not within the scope of his employment. Is the defense good? Judgment for whom and why?

A. Judgment for A. "The rule relieving a master from liability for a malicious injury inflicted by his servant, when not acting within the scope of his employment, does not apply as between a common carrier of passengers and a passenger. Such a carrier undertakes to protect a passenger against any injury resulting from the negligence or willful misconduct of its servants, while engaged in performing a duty which the carrier owes to the passenger. The carrier's obligation is to carry his passengers safely and properly, and to treat them respectfully, and if he intrusts this duty to his servants, the law holds him responsible for the manner in which they execute the trust." *Stewart v. R. R.*, 90 N. Y. 588.

Q. X, a passenger on a street railway car, uses profane and insulting language to the conductor of said car, whereupon the latter strikes and severely injures him. X sues the company. Can he recover? Give your reasons.

A. No. "While it is true that the use of the abusive language to the conductor did not justify the assault, so far as the conductor was concerned, in the eyes of the criminal law, there is no reason for holding that where a passenger, by his own improper and insulting behavior while a passenger, brought upon himself the assault, that the carrier should be held responsible. It is clear that the conductor was not acting within the course of his employment and the defendant could only be held liable under the rule, that the carrier was responsible for the willful acts of its servants; but such rule can have no application to a case, where the injury was brought about by improper behavior of the passenger, which caused the assault of which he complains." *Scott v. R. R.*, 53 Hun, 414; *Kosters v. R. R.*, 151 N. Y. 630. It seems that where a passenger on a car is assaulted by the conductor for remonstrating with him for abusing another passenger, the company would be liable. A distinction must be drawn between a case where the passenger with the intention of bringing about an altercation, uses profane and insulting language, and is then assaulted by the conductor; in such a case the passenger could not recover. In *Stewart v. R. R.*, supra, the passenger had an altercation with the conductor for beating a boy, and was assaulted by the conductor; the court held the company liable. In the case of *Weber v. R. R.*, 47 App. Div. 306, the court draws a distinction and seems to hold that a recovery would be allowed in all such cases, except where the passenger, with the intention of bringing about an altercation, is assaulted by the conductor, could not recover.

Q. A goes to the station of the X Railroad Company, and tenders a \$2 bill in payment for a ticket. The ticket agent has been notified by the police authorities to watch for men of a certain description, suspected of passing counterfeit bills. The agent suspected A of being one of the counterfeiters wanted by the police, and thought the bill looked queer, but nevertheless took it, and gave back the change with the ticket, saying nothing to A. The agent then sent for a police officer, to whom he pointed out A who was then on the station platform. A was arrested. The

bill was subsequently pronounced to be genuine, and A was discharged. A brings action against the company. Can he recover?

A. No. "The company is not responsible, because the agent was not, in what he did, acting within the scope and line of his duty. His acts were not such as would be deemed to be performed in the course of his employment, or such as were demanded for the protection of his employer's interest, but rather those of a citizen, desirous of aiding the police in the detection and arrest of persons suspected of being engaged in the commission of a crime. His duty as the particular agent of the company, was to have refused to accept and change the bill tendered in payment for the passage ticket, if he supposed that it was not genuine, and when he did accept it, his only purpose could have been to further the efforts of the police authorities by such a step, and could not possibly be considered as something which his employer or employment required of him. Here the ticket agent was not acting for the protection of the company's interests, but went quite outside of the line of his duty to perform a supposed service to the community, by procuring the arrest of criminals whom he knew the authorities were endeavoring to apprehend." *Mulligan v. R. R.*, 129 N. Y. 506.

Q. A purchased a ticket of the agent at an elevated railroad station, and passed through to take the cars after some dispute about the amount of the change. The ticket agent immediately afterwards came out upon the platform of the station, charged him with having given a counterfeit piece of money, and demanded another coin in place of it. A insisted upon the money being genuine, and refused to give another coin or to hand back the change. The ticket agent called him a counterfeiter and detained him in the station until he could procure a policeman to arrest and search him. The charge proving unfounded, A brings action against the company. Can he recover?

A. Yes. This case must be distinguished from the preceding

case, in that the act was done within the agent's authority and for the company's interests. "Here the agent was acting for his employers, and with no other conceivable motive; losing his temper and injuring and insulting the plaintiff upon the occasion. He believed that plaintiff had passed a counterfeit piece of money upon him, and thus had obtained a passage ticket and good money in change. What he did was in the endeavor to protect and to recover his employer's property; and if, in his conduct, he committed an error, which was accompanied by insulting language and the detention of the person, the defendant, as his employer, is legally responsible, in an action for damages for the injury. For all the acts of a servant or agent which are done in the prosecution of the business entrusted to him, the carrier becomes civilly liable, if its passengers or strangers receive injury therefrom. The good faith and motive of the defendant are not a defense, if the act was unlawful. Though injury and insults are acts in departure of the authority inferred or implied, nevertheless as they occur in the course of the employment, the master becomes responsible for the wrong committed." Gray, J., in *Palmeri v. R. R.*, 133 N. Y. 261.

Q. In an action by A against the X Railroad Company for false imprisonment, it appeared that A had purchased a ticket for passage on the trains of the X Railroad, and that he had boarded one of the trains of the said railroad company. That before reaching his destination he had lost his ticket. When he reached the end of the journey he tried to pass out of the station, but was not allowed to do so by the station master who told him that he could not pass unless he paid his fare or purchased a ticket. A then stated to the station master that he had purchased a ticket but had lost the same, but the station master would not let him pass. When A insisted on passing, the station master ordered his arrest. It was the duty of the station master not to permit anyone to pass unless he had a ticket or paid his fare. Conceding the above facts as stated, judgment for whom and why?

A. Judgment for A. "The defendant had such a regulation

and no complaint can be made of that. But it had no regulation and could legally have none that a passenger before leaving its cars or its premises should produce a ticket or pay his fare, and if he did not, that he should then and there be detained until he should do so. At most the plaintiff was a debtor to the defendant to the amount of his fare, and that debt could be enforced against him by the same remedies which any creditor has against his debtor. If the defendant had the right to detain him to enforce payment of the fare for ten minutes, it could detain him for one hour, or a day, or a year, or for any other time until compliance with its demand. That would be arbitrary imprisonment by a creditor without process or trial, to continue during his will until his debt should be paid. Even if a reasonable detention may be justified to enable the carrier to inquire into the circumstances, it cannot be to compel payment of fare. The detention here was not to enable the gatekeeper to make any inquiry, but simply to make payment. He was absolutely informed that he could not pass out without producing the ticket or paying his fare." Earl, J., in *Lynch v. R. R.*, 90 N. Y. 77.

Q. A tramp was stealing a ride on a railroad car. A brakeman employed by the railroad company kicked the tramp off the car while it was in motion. The tramp fell under the wheels of the car, and was injured. He brings suit against the railroad company, which defends: 1. That the plaintiff was a trespasser. 2. That the brakeman was not acting within the scope of his employment. Judgment for whom and why?

A. The company is liable. The company had a right to remove plaintiff from the car but not by the unreasonable and improper means which they used, and which subjected him to unnecessary danger. It is true in this case that the plaintiff was a trespasser, and the company owed him no duty of protection. Its servants had a right to remove him from the car but could not subject him to any extra hazard in doing so, or to so violently assault him as to cause him to fall from it. Although he was a trespasser, they owed him the duty not to subject him to

danger. Although the brakeman's act was unreasonable and ill-timed, yet it was clearly within the scope of his employment, for it was his duty to expel trespassers from the train. *McCann v. R. R.*, 117 N. Y. 505; *Ansteth v. R. R.*, 145 N. Y. 210.

Q. A wished to cross a street which was blocked by vehicles and by the car of the X Railway Company. He mounted the platform of the car for the purpose of reaching the other side of the street, and in doing so was struck by the driver of the car, causing him to fall and severely injure himself. He sues the company for the damages sustained. Can he recover? Give reasons.

A. The company is liable. "Where a street car is stopped so as to obstruct the passage of a traveler on foot desiring to cross the street, it is not a trespass or wrongful act on his part to step upon and pass over the car in order to avoid the obstruction; he has a right to do so. The company had no right to remove the plaintiff from the platform and hence could confer none on its servants. The driver was acting within the course of his employment in keeping the platform clear." *Shea v. R. R.*, 62 N. Y. 180.

Q. A, a conductor on a freight train, invited B, who is walking along the road, to come aboard the train. B does so. While on the car, he is injured by the negligence of the company's employees. B sues the company. Can he recover?

A. No. B was not riding as a passenger and therefore had no rights as such. The conductor had no authority, actual or apparent, to invite him to board the train, and the company cannot be held liable. *Eaton v. R. R.*, 57 N. Y. 322.

(NOTE.) In *Ulrich v. R. R.*, 108 N. Y. 80, one traveling on a free pass was injured by a collision due to the negligence of the railroad company. Upon the pass was an indorsement releasing the company from liability in case of accident. Held, that the person was not a passenger, and could not recover against the railroad company.

Q. A, a passenger on a street car, informs the conductor that B, a fellow passenger, is intoxicated and threatens to strike

him. The conductor pays no attention to this. B strikes A, injuring him severely. A brings action against the company. Can he recover?

A. Yes. "A railroad company is not responsible for the wrongful acts of a passenger, but it is bound to exercise the utmost vigilance in maintaining order and guarding its passengers against violence. It has authority to refuse to receive as a passenger, one who so demeans himself, so as to endanger the safety, or interferes with the reasonable comforts and convenience of other passengers; and this police power, the conductor or other servant in charge of the car is bound to exercise with all the means at its command when the occasion requires. If this duty is neglected, and in consequence a passenger receives injury which might have been reasonably anticipated, the company is liable. The fact that an individual has drunk to excess will not, in every case warrant his expulsion; it is rather the effect upon him and that by reason of intoxication, he is dangerous and annoying to others, that gives the right and imposes the duty of expulsion. The conductor is only called upon to act upon improprieties or offenses witnessed by or made known to him; and the company can only be charged for the neglect of some duty arising from circumstances of which the conductor was cognizant, all of which in the discharge of his duties he ought to have been cognizant." *Putnam v. R. R.*, 55 N. Y. 108; *Carpenter v. R. R.*, 97 N. Y. 494.

Q. A was about to alight from a railroad car on which he was a passenger, when the conductor, under no obligation in the discharge of his duty to do so, but simply to show his gallantry, assumed to assist her, and did so, but in such a negligent way by suddenly withdrawing his support, as to cause A to fall and severely injure herself. She was free from negligence. A brings suit against the company. Can she recover?

A. Yes. "I think we must reach the conclusion that, while the defendant was under no obligation to supply the aid of a servant in assisting the plaintiff to descend from the car, yet

as the conductor undertook to do so, she had the right to rely upon that official's careful performance of his undertaking, and to hold the defendant responsible for any failure on his part to use reasonable care." Gray, J., in *Hanlon v. R. R. Co.*, 187 N. Y. 77.

Q. While A was a passenger on the Erie R. R., the train was suddenly derailed, and he was severely injured. He brings action to recover damages and at the trial his attorney proved these facts and nothing more. The company's attorney moves to dismiss on the ground that plaintiff has shown no negligence against the company. How should the court decide the motion?

A. The motion to dismiss should be denied. "Whenever a car or train leaves the track, it proves that either the tracks or machinery or some portion thereof is not in a proper condition, or that the machinery is not properly operated, and presumptively proves that the defendant, whose duty it is to keep the track and machinery in the proper condition and to operate it with the necessary prudence and care, has in some respect violated his duty." *Edgerton v. R. R.*, 39 N. Y. 227. Defendant was then bound to show and give some explanation of the cause of the accident. Plaintiff had established a *prima facie* case and the burden of explaining the cause of the accident rested upon the defendant. This rule is well settled. *Caldwell v. S. S. Co.*, 47 N. Y. 291; *Ginna v. R. R.*, 67 N. Y. 597; *Seybold v. R. R.*, 95 N. Y. 562; *Cosulitch v. S. O. Co.*, 122 N. Y. 127.

CHAPTER V

Constitutional Law

Q. The provisions of a treaty made between the United States and Great Britain are in conflict with a statute of the United States which has been in force since 1796. The court is called upon to determine which is binding upon it, the treaty or the statute. What should its judgment be and why?

A. The judgment should be that the last in order of time prevails. Article 6 of the United States Constitution provides in part as follows: This Constitution and the laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall be made under the authority of the United States, shall be the supreme law of the land, and the judges in every state shall be bound thereby, anything in the Constitution, or laws in any state to the contrary notwithstanding." "As between a law of the United States made in pursuance of the Constitution and a treaty made under the authority of the United States, if the two in any of their provisions are found to conflict, the last one in point of time must control. For the one as well as the other is an act of sovereignty, differing only in form and in the organ and agency through which the sovereign will is declared. Each alike is the law of the land in its adoption, and the last law must repeal everything that is of no higher authority which is found to come in conflict with it. A treaty may therefore supersede a prior act of Congress, and on the other hand an act of Congress may supersede a prior treaty." Cooley, Const. Law, pp. 31, 32. See *Foster v. Neilson*, 2 Peters (U. S.), 253.

Q. The city of Buffalo makes an assessment on property, to pay for certain local improvements which benefit the property, but gives no notice to the owner. The owner comes to you for

advice. What are his rights, and what constitutional provision is involved?

A. He has the right to have the assessment vacated. The constitutional provision involved is that part of sec. 6 of art. 1 of the New York Constitution which provides as follows: "No person shall be deprived of life, liberty or property without due process of law." "A law imposing an assessment for local improvement, without notice to, and without a hearing, or an opportunity to be heard on the part of the owner of the property to be assessed, has the effect to deprive him of his property without due process of law, and is unconstitutional. The legislature may prescribe the kind of notice, and the mode in which it may be given, but it cannot dispense with all notice. It is not enough that the owner may by chance have notice, or that he may, as a matter of favor, have a hearing; the law must require notice and give a right to a hearing." *Stuart v. Palmer*, 74 N. Y. 184. "The notice need not be personal, as it may be by general statute which is notice to all, but it must afford a reasonable opportunity to make complaint. It must be of such a character that compliance therewith is possible so that the taxpayer may object or protest, even if he has no just ground for doing either." *Vann, J., in People ex rel. v. Feitner*, 191 N. Y. 97. See also *Douglas v. Supervisors*, 172 N. Y. 314; *People ex rel. v. O'Donnel*, 183 N. Y. 9.

(NOTE.) A statute requiring notice to be given in several newspapers at different times not being carried out regularly, can be cured by subsequent legislation validating the irregularity, and although notice was only published once, it will be sufficient. *Tift v. City of Buffalo*, 82 N. Y. 204; *W. I. B. Co. v. Attica*, 119 N. Y. 204.

Q. A commits a crime. After the crime was committed, but before sentence, a law is passed increasing the penalty and providing that it shall apply to "all crimes heretofore as well as hereafter committed." He is sentenced according to this statute, and the case is taken to a higher court on appeal. What should the appellate court do?

A. The judgment should be reversed, for as to him the law is

ex post facto and therefore void. Ex post facto laws are classified in the leading case of *Calder v. Bull*, 3 Dallas (U. S.), 386, as follows: "1. Every law which makes an act done before the passing of the law, and which was innocently done, criminal, and punishes such act. 2. Every law that aggravates a crime, or makes it greater than it was when committed. 3. Every law that changes the punishment, and inflicts a greater punishment than the law annexed to the crime when committed. 4. Every law that alters the legal rules of evidence, and receives less or different testimony than the law required at the commission of the crime, in order to convict the offender." "That is an ex post facto law, which increases the punishment denounced against the act when committed, or punishes an offense in a manner in which it was not punishable when committed, irrespective of its comparative severity, unless the new punishment is one of the same in kind as the old but less in degree." *Hartung v. People*, 22 N. Y. 95; *Shepard v. People*, 25 N. Y. 406. A statute which permits the infliction of a lesser degree of the same kind of punishment than was permissible when the offense was committed is not ex post facto. *People v. Hayes*, 140 N. Y. 484.

Q. A commits crime in May, 1905. The Statute of Limitations then for that crime was three years. In May, 1908, the legislature passes an act by which the limitation is extended to five years. In June, 1909, A is arrested for the offense committed May, 1905. You are called upon to advise as to his rights, and as to the constitutionality of the law. What would be your advice?

A. The law is ex post facto as to A, and therefore unconstitutional and void. "A law requiring all indictments to be found and filed within three years after the commission of the offense, by extending the time to five years, does not apply to offenses committed prior to the passage thereof." *People v. Lord*, 12 Hun, 282; *People v. O'Neil*, 109 N. Y. 251. "A law is never to have retroactive effect unless its express letter or clearly manifested intention requires that it should have such effect. If all

its language can be satisfied by giving it prospective operation, it should have such operation only." *R. R. Co. v. Van Horn*, 57 N. Y. 477.

Q. A and B are husband and wife. The evidence of the wife is inadmissible at the time C sues B on a certain claim. Thereafter the legislature passes a law, providing that the wife's evidence shall be admissible. C, being informed that the wife has knowledge of certain facts material to his case, the evidence of which would be admissible under the new law, subpoenas her. Objection is made to the admissibility of the evidence. Is the objection good?

A. The evidence is admissible, as the law is constitutional. "While the legislature cannot take from persons vested rights without compensation, the remedy by which rights are to be enforced or defended, is within the absolute control of that branch of the government. There is no vested right in a rule of evidence, as such rules only affect the remedy, and it is within the constitutional power of the legislature to modify them, and to enact new rules as to the qualifications and competency of witnesses." *Howard v. Moot*, 64 N. Y. 262; *People v. Turner*, 117 N. Y. 233. "Due process of law does not mean that the legislature cannot change the rules of evidence as they existed at common law, nor make one a competent witness who was not such at common law." *People v. Johnson*, 185 N. Y. 229.

Q. The statute provides that any person who engages in the business or works as a barber on Sunday, shall be deemed to be guilty of a misdemeanor, and on conviction thereof, shall be fined and imprisoned. Your client is a barber who does not believe in Sunday as a religious institution, and who needs the money that the carrying on of the business on Sunday brings him. He is arrested for violating the statute. Is such a statute valid? If so, upon what principle can it be maintained?

A. This statute is valid as a proper exercise of the police power. "The act, which makes it a misdemeanor for any person to carry on or engage in the business or work of a barber on

Sunday, is a valid exercise of the police power by the legislature, works no deprivation of liberty or property within the meaning of the Constitution, and does not violate the Fourteenth Amendment to the Federal Constitution by denying the equal protection of the law." *People v. Havnor*, 149 N. Y. 195. "All property and all rights within the jurisdiction of the state are subject to the regulations and restraints of its police power, except so far as they are removed therefrom, by the express provisions or implications of the Federal Constitution. The police power may be defined in general terms, as that power which inheres in the legislature to make, ordain and establish all manner of reasonable regulations and laws whereby to preserve the peace and order of society, and the safety of its members, and to prescribe the mode and manner in which everyone may so use and enjoy that which is his own, and not to preclude a corresponding use and enjoyment of their own by others." *Cooley*, *Const. Law*, p. 338. "The Fourteenth Amendment is held not to have taken from the states the police power reserved to them at the time of the adoption of the Constitution. It does not deprive the states of the right to preserve order within their limits, to pass laws against crimes and punish offenders, to regulate relations between individuals, to control for the public good the use of private property, to protect the health, life, and the safety of the people, and, to that end, not only to enact suitable legislation, but to destroy private property that is dangerous to the well-being of the state." *Cooley*, *Const. Law*, p. 251. See also *Colon v. Lisk*, 153 N. Y. 188.

Q. The legislature passes an act prohibiting the manufacture of cigars in any form in tenement houses. A has a store in a tenement house in which he manufactures cigars. He is arrested charged with a violation of this law, and upon the trial he sets up the defense that the law is unconstitutional. What should be the decision of the court and why?

A. The decision should be that the law is unconstitutional. "While generally, it is for the legislature to determine what

laws are required to protect and secure public health, comfort and safety under the guise of police regulation, it may not arbitrarily infringe upon personal or property rights, and its determination what is a proper exercise of the power, is not final or conclusive, but is subject to the scrutiny of the courts. When, therefore, the legislature passes an act ostensibly for the public health, but which does not relate to, and is inappropriate for the purpose, and which destroys the property or interferes with the rights of citizens, it is within the province of the court to determine this fact, and to declare the act violative of the constitutional guaranties of those rights." *Matter of Jacobs*, 98 N. Y. 98; *People ex rel. v. Murphy*, 195 N. Y. 135; *People v. N. Y. C. A. Co.*, 196 N. Y. 435.

Q. A purchases a lot in Buffalo, intending to erect thereon a building. Before he commences work, the legislature passes a law extending the fire limits, the effect of which is to prohibit A from building anything but a brick or stone house. A, not having the necessary means to build a house of such materials, is prevented from building. Is the law constitutional?

A. This law is constitutional. This is a legitimate exercise of the police power, because it has for its purpose the protection of the lives and property of its people, and does not deprive them of property without due process of law. *People v. Marx*, 99 N. Y. 386; *Tenement House Department v. Moeschen*, 179 N. Y. 325.

Q. Is the law making it a crime to sell passage tickets for vessels and railroads, except by common carriers or their duly authorized agents, constitutional? Give reasons in full.

A. The law is unconstitutional; not being a proper exercise of the police power. "Argument is certainly not needed in the light of these decisions to support the assertion that the "liberty" of this relator and other citizens of this state to engage in the business of brokerage in passage tickets is sought to be interfered with by the statute under consideration, for brokerage in such tickets has been a lawful business in this state for many years, and many persons have pursued it. It is still a lawful

business, although the right to engage in it is limited to such persons as may be appointed by the transportation companies. The statute is, therefore, in contravention of the State Constitution, and is void, unless its enactment by the legislature is a valid exercise of the police power. That power is very broad and comprehensive, and has not yet been fully described or its extent plainly limited, but it is exercised to promote the health, comfort, safety and welfare of society. . . . It was held that the power, however broad and extensive, is not above the Constitution, in obedience to the commands of which the courts will protect the rights of individuals from invasion under the guise of police regulation, and while it is the general province of the legislature to determine what laws are needed to protect the public health, comfort and safety, courts must be able to say upon a perusal of the enactment, that there is some fair and reasonable connection between it and the ends above mentioned. Unless such relation exists, an enactment cannot be upheld as an exercise of the police power." Parker, Ch. J., in *People ex rel. Tyroller v. Warden of Prison*, 157 N. Y. 116.

Q. The legislature passes a law prohibiting any employer upon the hiring of help to make it conditional that the employee shall not join or become a member of any labor organization. What do you say as to the constitutionality of this act?

A. The law is unconstitutional and void. "An enactment that a person shall not make the employment or the continuance of an employment of a person conditional upon the employee not joining or becoming a member of a labor organization, is an unauthorized restraint upon the freedom to contract in relation to the purchase and sale of labor and is unconstitutional. The free and untrammelled right to contract is a part of the liberty guaranteed to every citizen by the Federal and State Constitutions. Personal liberty is always subject to restraint when its exercise affects the safety, health or moral and general welfare of the public, but subject to such restraint an employer and employee may make and enforce such contracts as they may agree upon." *People v. Marcus*, 185 N. Y. 258.

Q. A is anxious to obtain a right of way through B's land, and offers to purchase it from him (B), but B refuses to sell it. A procures the passage of an act by the legislature, which by its terms compels B to sell the right of way to A. B attacks the constitutionality of the law in the courts. What should the decision be?

A. The decision must be that the law is unconstitutional. "The statute authorizing a private road to be laid out over the lands of a person without his consent is unconstitutional and void. The legislature can exercise the right of eminent domain for public purposes only. Private property cannot be taken even for a public use without making just compensation to the owner." *Taylor v. Porter*, 4 Hill, 140; *Waterloo Mfg. Co. v. Shanahan*, 128 N. Y. 345; *Matter of Mayor, etc.*, 135 N. Y. 253.

Q. The city under the right of eminent domain was authorized by statute to condemn and take certain lands for public use as a reservoir, with the right to take immediate possession. Sufficient moneys were appropriated for the payment of the lands to the owners as soon as the value of the lands so taken was ascertained. The constitutionality of this law is attacked. What do you say?

A. The law is constitutional. "While payment need not precede the taking, the provision for compensation must not only pre-exist, but it must be so definite and certain as to leave nothing open to litigation, except the title to the property taken and the amount of damages which the owner may recover." *Litchfield v. Bond*, 186 N. Y. 74.

Q. A railroad corporation is authorized by the railroad law to condemn private property for the purposes of its incorporation. The railroad seeks to condemn property belonging to A, so that it may build a storage warehouse thereon, in which the goods of its shippers along its road may be kept until a favorable market for their sale exists. A brings action to restrain this. Can the action be maintained?

A. A can restrain the threatened act. "The acquisition of lands for speculation of sales, or to prevent interference by competing lines, or methods of transportation, or in aid of collateral enterprises, remotely connected with the running or operating of the road, although they may increase its revenue and business, are not such purposes as authorize the condemnation of private property therefor, and is unconstitutional." *R. R. Co. v. Davis*, 43 N. Y. 137.

(NOTE.) "The eminent domain may be defined as the lawful authority which exists in every sovereignty to control and regulate those rights of a public nature, which pertains to its citizens, and to appropriate and control individual property for the public benefit, as the public safety, necessity, convenience or welfare may demand." *Cooley*, *Const. Law*, p. 363.

Q. A railroad company having a station in a certain city, finds it necessary because of the increase of business, to have a larger station. It owns no land itself, and the property owners will not sell. The railroad company consults you. What would you advise?

A. The railroad company can institute condemnation proceedings to obtain the land necessary for its station. "Passenger depots, convenient and proper places for the storing and keeping of cars and locomotives, proper, secure and convenient places for the receipt and delivery of freight, are among the acknowledged necessities for the running and operating of a railroad; and the right to take land for these purposes, is included in the grant of power which authorizes railroad corporations to acquire real property for the purposes of their incorporation or for the purpose of running and operating their road." *R. R. Co. v. Kip*, 46 N. Y. 546; *Matter of N. Y. C. R. R. Co.*, 77 N. Y. 261; *Matter of R. T. Co.*, 103 N. Y. 258.

(NOTE.) One railroad corporation cannot condemn property of another railroad corporation without express legislative enactment, nor can a railroad corporation condemn public property for the use of its incorporation, unless by express enactment or by necessary implication. A railroad corporation can, under the power of eminent domain, condemn property of a private corporation. See *Matter of Boston & Albany R. R. Co.*, 53 N. Y. 574; *Matter of Petition of N. Y. L. & W. R. R. Co.*, 99 N. Y. 12.

Q. The New York State Constitution provides that the legislature shall not incorporate any corporation by special act, except for municipal purposes or when, in its judgment, its objects cannot be carried out under the general law. The legislature passes a law, incorporating a certain company for purposes not municipal. Can that act of the legislature be reviewed?

A. No. "By the Constitution of this state it is declared that corporations may be formed under general laws, and shall not be created by special act, except in cases where in the judgment of the legislature the objects of the corporation cannot be attained under the general laws. By this provision of the Constitution, it is left to the legislature to decide whether the objects of the corporation can be attained under a general law. It is well settled in this state, that whether a special act of incorporation is necessary or not, is a matter in the discretion of the legislature, and the courts have no power to review this action of the legislature." *People v. Bowen*, 21 N. Y. 517; *Met. Bank v. Van Dyck*, 27 N. Y. 448.

Q. A right of action was vested. At that time there was a statute of limitation of five years. Four years passed before the action was brought. Previously, however, a law was passed changing the limitation to four years, thus barring the plaintiff's right of action. Is the law valid as against plaintiff? What is the principle involved?

A. The law is void as against plaintiff, being unconstitutional. An enactment of a new statute of limitation is unconstitutional as to existing causes of action, if it fails to allow a reasonable time, after it takes effect, for the commencement of suits thereon. It is not enough that the act affords a reasonable interval between its passage or becoming a law, and its taking effect. "The right possessed by a person of enforcing his claim against another is property, and if a statute of limitation acting upon the right, deprives the claimant of a reasonable time within which suit may be brought, it violates the

constitutional provision "that no person can be deprived of property without due process of law." There is no question as to the power of the legislature to pass, or to shorten statutes of limitations. A party has no more a vested interest in the time for the commencement of an action than he has in the form of the action. The only restriction upon the legislature in the enactment of statutes of limitations, is that a reasonable time be allowed for suits upon causes of action theretofore existing." Gray, J., in *Gilbert v. Ackerman*, 159 N. Y. 118. See also *People v. Turner*, 117 N. Y. 227.

Q. A was elected to the office of district attorney of X county, the term of office then being two years. Subsequently the legislature passes an act extending his term to four years. This is attacked as unconstitutional. What should be the decision of the court?

A. The law is unconstitutional and void. An incumbent's term of office cannot be prolonged by the legislature where the office can only be filled by election or appointment, for this would be in effect an appointment by the legislature, and therefore void. *People ex rel. Palmer*, 154 N. Y. 133; *Matter of Kelly v. Van Wyck*, 35 Misc. 210.

Q. A was elected to a public office which had certain fees attached to it by law. He qualifies and enters upon the duties of his office. Subsequently, the legislature passes an act reducing his fees. What are A's rights? Is the law constitutional?

A. The law is unconstitutional. It violates the prohibition contained in art. 3, sec. 18, of the New York Constitution, which is as follows: "The legislature shall not pass a private or local bill in any of the following cases: Creating, increasing or decreasing fees, percentage or allowance of public officers who are elected or appointed."

Q. The legislature passes an act changing the name of John Brown to Thomas Smith. John Brown objects and

consults you as to his rights. What would you advise him? Is the act constitutional?

A. The act is unconstitutional and void. Article 3, sec. 18, of the New York Constitution provides in part as follows: "The legislature shall not pass a private or local bill. Changing the names of persons."

Q. The legislature passes an act, authorizing a street railroad company to lay its tracks along certain streets without any further proceedings. The property owners along the street object. Have they any remedy? Give your opinion as to this legislation.

A. The act is unconstitutional and void. The abutting owners can enjoin the laying of the tracks, and the operation of the road, being an act in violation of the Constitution, art. 3, sec. 18, which provides in part as follows: "But no law shall authorize the construction or operation of a street railroad, except upon condition that the consent of the owners of one-half in value of the property bounded on, and the consent also of the local authorities having control of that portion of the street or highway, upon which it is proposed to construct or operate such railroad, be first obtained, or in case the consent of such property owners cannot be obtained, the Appellate Division of the Supreme Court of the department in which it is proposed to be constructed, may upon application, appoint three commissioners, who shall determine after a hearing of all the parties interested, whether such railroad ought to be constructed or operated, and their determination confirmed by the court, may be taken in lieu of the consent of the property owners."

Q. A railroad corporation desired to operate its road through the streets of X, and was unable to obtain the property owners' consent. Subsequently the corporation applies to the appellate division for the appointment of commissioners, who decide that the company cannot operate its road through the streets of X. The appellate division confirms the report of the com-

missioners. Thereafter the legislature passes a special act, giving to the company the right to operate its road through the streets of X. Is the law constitutional?

A. The law is unconstitutional and void. The commissioners having decided against the operation of the road, the case stands the same as if no application was made, therefore the act, attempting to give the right to lay down the tracks without the property owners' consent is in contravention of art. 3, sec. 18, of the New York Constitution, *supra*, and void.

Q. The legislature passes an act, limiting the amount of damages recoverable for injuries resulting in death to \$10,000. Is this act constitutional?

A. This act is clearly unconstitutional, being in contravention of art. 1, sec. 18, of the New York Constitution, which is as follows: "The right of action now existing to recover damages for injuries resulting in death, shall never be abrogated; and the amount recoverable shall not be subject to any statutory limitation."

Q. A law is passed discontinuing a highway, and provision is made for the allowance of a claim for the maintenance of said highway. What do you say as to the validity of this act?

A. This law is unconstitutional and void on the following grounds: 1. Being a private or local bill, and embracing more than one subject. Section 16 of art. 3 of the New York Constitution. 2. It is a private or local bill discontinuing a highway. Article 3, sec. 18, of the New York Constitution. 3. It permits a private claim against the state. Article 3, sec. 19, of the New York Constitution; *People ex rel. Corscadden v. Howe*, 177 N. Y. 499.

Q. The legislature passes an act exempting A's property from taxation in the county of Queens, for the reason that he (A) was very charitable and public-spirited. Question arises as to the validity of this act. What do you say?

A. The law is unconstitutional and void, being in contravention of art. 3, sec. 18, of the New York Constitution, which in part is as follows: "Granting to any person, association, firm or corporation, an exemption from taxation on real or personal property."

Q. A was charged with the commission of a criminal offense in a certain county of this state, was indicted, tried and acquitted. Subsequently, it was claimed that the offense for which he had been tried was really committed in an adjoining county, and he was indicted, tried and convicted in that county for the same offense. During the second trial, the district attorney put him upon the witness stand against the objection of his counsel, and he was compelled to testify that he was present at the time and place at which the offense was committed. A appeals from the conviction. Is the appeal well taken? State your reasons.

A. The appeal is well taken and the judgment must be reversed. The second trial was in violation of the constitutional provision, "that no person shall be subject for the same offense to be twice put in jeopardy of life or limb." An acquittal is a bar to any subsequent trial for the same offense. Section 140 of the Code of Crim. Pro. covers this point and is as follows: "When a crime is within the jurisdiction of two or more counties of this state, a conviction or acquittal thereof in one county is a bar to a prosecution or indictment thereof in another." Section 9 of the Code of Crim. Pro. provides: "No person can be subjected to a second prosecution for a crime for which he has once been prosecuted or acquitted." As to the other point, it was a violation of the constitutional provision: "That no person can be compelled in a criminal action to be a witness against himself." This provision is also found in sec. 10 of the Code of Crim. Pro.

Q. A is indicted for murder in the first degree. He is put on trial and convicted of murder in the second degree. He appeals from the conviction, and the appellate court grants him a new trial. He is subsequently put on trial for murder

in the first degree, and objects, claiming that he cannot again be tried for murder in the first degree. Was this objection good?

A. No. "Where a defendant is convicted of a lower degree of the crime charged in the indictment, and on appeal, judgment is reversed and a new trial ordered, the case stands as if there had been no trial, and the defendant must be tried under the indictment as it is, not simply for the lesser grade of crime of which he was convicted. This is not unconstitutional as subjecting a person to be twice put in jeopardy for the same offense, as the jeopardy is incurred with the consent of, and as a privilege granted to the defendant upon his own application." *People v. Palmer*, 109 N. Y. 413.

(NOTE.) It must be observed that before the enactment of the Code of Crim. Pro., secs. 464, 544, a conviction of a lesser degree of crime amounted to an acquittal of the higher degree, and the defendant could not again be tried for the higher degree of crime. *People v. Dowling*, 84 N. Y. 478. The granting of a new trial places the parties in the same position as if no trial had taken place. It seems, however, that by the language of Gray, J., in *People v. Palmer*, supra, that where the indictment charges different crimes, a conviction of one will act as an acquittal of the others. He says: "The provisions of the statute are clear and explicit, in nowise contravene the letter or spirit of the fundamental law, and their meaning should not be perverted. It would be a grievous miscarriage of justice, and the intent of the law would be thwarted, if it should be held that a reversal upon a prisoner's appeal for errors of law upon his trial, had the effect of putting it out of the power of the people to further try him under the indictment, when his guilt might be competently established. We do not think that such is the result. The effect of the defendant's appeal is merely to continue the trial under the indictment in the appellate court; and if reversal of the judgment of conviction follows, the judgment, as well as the record of the former trial, have been annulled and expunged by the judgment of the appellate court, and they are as though they never have been; while the indictment is left to stand as to the crime, of which the prisoner has been charged and convicted, as though there had been no trial. Only where the result of the former trial was, in effect, an acquittal of another crime charged in the indictment may he plead that result in bar of further prosecution for that crime." See *People v. Cignarale*, 110 N. Y. 30; *People v. Wheeler*, 79 App. Div. 396.

Q. A is indicted for murder in the first degree. During the

course of the trial, one of the jurors becomes ill and is unable to attend. A's counsel consents to proceed with eleven jurors. A is convicted. He appeals. What should be the decision of the higher court?

A. The conviction is illegal and unconstitutional, and must be set aside. In criminal cases, at least in cases of felony, the accused cannot waive the right of trial by jury. By jury is meant in the constitution a common-law jury. This is a tribunal of twelve persons. The jury cannot consist of less than twelve, and a trial by less than that number even by consent, is a mistrial. If a defendant were allowed to waive his right of a trial by twelve jurors, he might also be allowed to waive his right of a trial by jury, which would in fact be a deprivation of life or liberty without due processes of law. *Cancemi v. People*, 18 N. Y. 128; *People v. Dohring*, 59 N. Y. 374.

Q. A is being tried for murder. The jury is taken to inspect the scene of the crime without A being present, he having refused to go along. He is convicted and appeals on the ground that testimony was taken without his presence. What should be the decision on appeal?

A. The judgment of conviction should be affirmed. "The view by the jury during the trial, as provided by sec. 411 of the Code of Crim. Pro., of the place in which the crime is charged to have been committed, is not a part of the trial, or the taking of testimony, within the contemplation of the Constitution, and the Bill of Rights, and the right of the defendant to be present thereat, may be waived even in a capital case." *People v. Thorn*, 156 N. Y. 286.

Q. Your client is arrested charged with a crime; he is in jail awaiting the action of the grand jury. The sheriff refuses to permit you to have an interview with him. What would you do?

A. The Constitution guarantees everyone charged with crime the right of counsel; therefore you can apply for a writ of mandamus to compel the sheriff to allow you an interview. A per-

son charged with crime is entitled to have counsel, even though an indictment is not found. *People ex rel. Burgess v. Risely*, 13 Abb. (N. C.) 186.

Q. A is being tried for robbery. He is compelled against his counsel's objection to stand up in court and be identified. He is convicted and appeals upon the ground that he was compelled to give evidence against himself. Should the appeal be sustained?

A. The appeal should be dismissed. "A witness under examination, or one present in court as a party, may be compelled by the court to stand up to be identified. This is not a violation of the constitutional provision, protecting a person from being compelled in a criminal case to be a witness against himself." *People v. Gardner*, 144 N. Y. 119.

Q. A is the owner of a large tract of land in Orange county. He leases it to B for agricultural purposes for a period of fifteen years. Question arises as to the validity of the lease. What do you say?

A. The lease is void, being in contravention of sec. 13, art. 1, of the New York Constitution, which is as follows: "No lease or grant of agricultural land, for a longer period than twelve years, hereafter made, in which shall be reserved any rent or service of any kind, shall be valid."

Q. A, who is the owner of a large tract of land in Erie county, leases the same to B for the purpose of extracting the mineral ore that may be found thereon. The lease is for a period of twenty years and A is to use such portions of the land for farming purposes until B should elect to use the same for mining purposes. The lease to B is attacked as being unconstitutional. What do you say?

A. The lease is constitutional being made for mining purposes. "The constitutional provision against leasing agricultural land for a longer period than twelve years, is not violated

by a lease for twenty years of all the iron ore contained in, on or under of a farm, with the right to enter upon the lands and excavate and carry away the ore, etc., where the lessee is expressly prohibited from permitting any business to be done upon the premises other than the business of mining while the lessor has the right to use such portions of the surface for farming purposes as he chooses, until the lessee elects to use the same for his mining operations." *Mass. Nat. Bank v. Shim*, 163 N. Y. 360.

Q. The legislature passes an act in relation to plumbing establishments, which by its provisions are oppressive and against the constitutional rights of said establishments. A, a banker, brought an action to restrain the enforcement of the said act. Can he do so?

A. He cannot maintain the action, as the act does not affect him. He cannot be injured by the enforcement of the said act. See *Bank v. Craig*, 181 U. S. 548.

Q. A, who was a Civil War veteran and who was honorably discharged from the United States Army, was appointed to a position in the comptroller's office without taking an examination under the civil service, although the said office was on the civil service list. The appointment is attacked as being unconstitutional. What do you say?

A. The appointment is unconstitutional and void. While the veteran has a preference in the appointment, he must if the position is in the civil service list, pass an examination. "When a list is made up of persons whose merit and fitness have been ascertained according to law, then such honorably discharged soldiers and sailors of the Civil War as appear thereon are entitled under the Constitution to preference in appointment and promotion therefrom, but the legislature cannot dispense with the necessity of ascertaining the merit and fitness of all applicants for employment in the civil service, for the Constitution safeguards the public service against all such attempts." *Matter of Stutzbach v. Coler*, 168 N. Y. 421.

Q. The legislature passes an act abolishing the office of Police Justice. A, an incumbent of the said office, attacks the constitutionality of the law. What do you say?

A. The law is constitutional; the office of Police Justice not being a constitutional one, may be abolished by the legislature. *Koch v. Mayor*, 152 N. Y. 77. "Subject only to the restrictions of the Constitution, the legislature may do what it thinks best with a public office or a public officer, by abolishing the office." *Koch v. Mayor*, *supra*.

Q. What are the qualifications of voters for officers elected by the people?

A. Article 2, sec. 1, of N. Y. Constitution answers this question, and is as follows: "Every male citizen of the age of twenty-one years, who shall have been a citizen for ninety days, and an inhabitant of this state one year next preceding an election, and for the last four months a resident of the county, and for the last thirty days a resident of the election district in which he may offer his vote, shall be entitled to vote at such election in the election district of which he shall at the time be a resident, and not elsewhere, for all officers that now are or hereafter may be elective by the people, and upon all questions which may be submitted to the vote of the people, provided that in time of war no elector in the actual military service of the state, or of the United states, in the army or navy thereof, shall be deprived of his vote by reason of his absence from such election district; and the legislature shall have power to provide the manner in which and the time and place at which such absent electors may vote, and for the return and canvass of their votes in the election districts in which they respectively reside."

CHAPTER VI

Contracts

Q. A writes to B, a carpenter, asking him to make certain office fixtures, and offering to pay a certain price therefor. B did not reply thereto, but purchased the necessary lumber and began the work. A thereafter wrote B countermanding the order. After receiving this letter, B brings suit for breach of contract. Can he recover?

A. No. A's offer was never accepted. "The note did not make an agreement. It was a proposition, and must have been accepted by the plaintiff before either party was bound, in contract, to the other. The only overt action which is claimed by the plaintiff, as indicating on his part an acceptance of the offer, was the purchase of the stuff necessary for the work, and commencing work, as we understand the testimony, upon that stuff. We understand the rule to be, that where an offer is made by one party to another when they are not together, the acceptance of it by that other must be manifested by some appropriate act. It does not need that the acceptance shall come to the knowledge of the one making the offer, that he shall be bound. But though the manifestation need not be brought to his knowledge before he becomes bound, he is not bound, if that manifestation is not put in a proper way, to be, in the usual course of events, in some reasonable time communicated to him. In the case in hand, the plaintiff determined to accept. But a mental determination, not indicated by speech, or put in course of indication by act to the other party, is not an acceptance which will bind the other. Nor does an act, which, in itself, is no indication of an acceptance, become such, because accompanied by an unevinced mental determination. Where the act interpreted by concurrent evidence of the mental purpose accompanying it, is as

well referable to one state of facts as another, it is no indication to the other party, of an acceptance, and does not operate to hold him to his offer. Conceding that the testimony shows that the plaintiff did resolve to accept this offer, he did no act which indicated an acceptance of it, to the defendants. He, a carpenter and builder, purchased stuff for the work. But it was stuff as fit for any other like work. There was nothing in his thought formed but not uttered, or in his acts that indicated or set in motion, an indication to the defendants of his acceptance of their offer, or which could necessarily result therein." Folger, J., in *White v. Corlies*, 46 N. Y. 467.

Q. A wires B that he has a horse, and thinks that he will suit B, describing him, whereupon B writes A that he will take the horse if he "will fill the bill." A immediately telegraphs B, "the horse is yours," and sends the horse to B by his man. B refuses to take the horse, saying that he has bought no horse of A. What are the rights of the parties? Give reasons.

A. A has no rights against B, as there was no contract. B's reply was not an acceptance of A's offer, nor was it a counter-offer. In order to have a contract, there must be mutual assent of the parties. An offer to sell imposes no obligation, until it is accepted according to its terms. *Mactier v. Frith*, 6 Wend. 103.

Q. A is an auctioneer, and B is a bidder on a certain property; the auctioneer says, "one, two, three," but before the hammer falls, B revokes his bid. The auctioneer said, "Sold to B for so much." What are the rights of the parties?

A. There was no contract, as the offer was withdrawn before acceptance. The auctioneer is the agent of the vendor, and the assent of both parties is necessary to make the contract binding; that is signified on the part of the seller by knocking down the hammer, which was not done here till the bidder had retracted. Every bidding is nothing more than an offer on one side, which is not binding on either side till it is assented to. This principle has been firmly established since the early

and leading English case of *Payne v. Cave*, 3 Term Rep. 148, and uniformly followed in this state. *Tuttle v. Love*, 7 Johns. 470; *Tucker v. Woods*, 12 Johns. 190; *Smyth v. Greacen*, 100 App. Div. 275.

Q. Defendant wrote to plaintiff offering to sell a horse for \$200. Plaintiff answered that he would reply in five days. As he is about to mail letter, he receives a telegram withdrawing the offer. He reads the telegram and mails the acceptance of the offer. What are the rights of the parties?

A. Plaintiff cannot recover as there was no contract, as the offer was withdrawn before acceptance. The receipt of the telegram operated as a revocation of the offer, and therefore, the attempted acceptance was of no avail, as there was no offer in existence at the time capable of being accepted. The revocation of an offer, to be effective, must always be communicated to the offeree. An offer cannot be withdrawn, unless the withdrawal reaches the party to whom it is addressed before the letter of reply announcing the acceptance has been mailed. *Tayloe v. Ins. Co.*, 9 How. (U. S.) 400. "When an offer is made and accepted by the posting of a letter of acceptance before notice of withdrawal is received, the contract is not impaired by the fact that a revocation had been mailed before the letter of acceptance." *Patrick v. Bowman*, 149 U. S. 411.

Q. A in New York writes B in California making a proposition of contract. Upon receipt of the letter, B mails an answer accepting his proposition; next day B telegraphs A rejecting the offer, telegram and letter reaching A at the same time. What are the rights of the parties?

A. B is liable, as there is a contract here, which arose upon the mailing of the letter of acceptance, irrespective of the time when the letter was received. An acceptance once given cannot be withdrawn, and therefore the telegram retracting the acceptance has no effect. "Where two parties, both being present together, enter into negotiations looking to the making

of a contract, the minds of both must ordinarily meet at the same time, upon the same identical terms, or no contract is made. Where the parties reside at a distance from each other, and the negotiations are conducted by written correspondence, though there must be the assent of both parties to the same provisions, it is of course impracticable that such assent be manifested simultaneously. One must state what he is willing to agree to, and the other must, when the proposition has reached him, assent to the same terms, and in some manner manifest that assent." Selden, J., in *Vassar v. Camp*, 11 N. Y. 441. "It is only necessary that there should be a concurrence of the minds of the parties upon a distinct proposition, manifested by an overt act, and the sending of a letter, announcing the consent to the proposal, was a sufficient manifestation, and consummated the contract from the time it was sent. The sending of the letter accepting the proposition is regarded as an acceptance, because it is an overt act clearly manifesting the intention of the party sending it, to close with the offer of him to whom it is sent, and thus making that 'aggregatio mentium' which is necessary to constitute a contract." Scrugham, J., in *Trevor v. Wood*, 36 N. Y. 307. "The minds of the parties met, when the plaintiff complied with the usual, or even occasional practice, and left the acceptance in a place of deposit recognized as such by the defendant. The doctrine is analogous to that which has been adopted in the case of communication by letter or telegram. The principle governing these cases is, that there is a concurrence of the minds of the parties upon a distinct proposition, manifested by an overt act." Dwight, C., in *Howard v. Daly*, 61 N. Y. 362.

Q. A wrote B, offering to sell the latter 100 barrels of flour at \$10 per barrel, and gave the latter ten days in which to accept or reject the proposition. On the third day thereafter, A sold the flour to C, and B on the fourth day, without notice, wrote A accepting the offer. B, on learning of the sale, brings suit against A. Judgment for whom and why? Suppose B had notice of the sale before accepting the offer, how would this affect your answer?

A. Judgment for B, but if he had notice of the sale, no recovery would be allowed. While in general, a revocation of an offer to be effective, must be communicated to the offeree by the offeror, yet it is held that any act of the offeror, inconsistent with the continuance of the offer, such as a sale of the property to some other person, or any other overt act clearly showing an intention to revoke, and which comes to the knowledge of the offeree, constitutes a revocation. B here accepted before the offer was withdrawn, and therefore can recover. But of course, if he obtained information of the sale to C before accepting, his acceptance would be of no effect. *Chicago Co. v. Dane*, 43 N. Y. 240.

Q. A sent an order for 100 barrels of flour to B on twenty days' credit, A agreeing to pay the freight. B, not having 100 barrels in stock, and having only 99 barrels, sent them to A on ten days' credit. This time of credit had always been customary with B, and A knew of it. B sent a bill to A for 99 barrels on ten days' credit. The goods were destroyed in transit. Who must bear the loss?

A. The loss falls upon B, as there was no contract. If a person sends an order to a merchant to send a particular quantity of goods upon certain terms of credit, and the merchant sends a less quantity of goods at a shorter credit, and the goods sent are lost on the way, the merchant must bear the loss, as there is no contract between the parties. There is no agreement, no meeting of the minds of the parties as to the subject-matter of the contract. *Bruce v. Pearson*, 3 Johns. 534.

(NOTE.) "As no contract is complete without the mutual assent of the parties, an offer to sell imposes no obligation until it is accepted according to its terms. So long as the offer has neither been accepted nor rejected the negotiation remains open, and imposes no obligation on either party; the one may decline to accept, or the other may withdraw the offer, and either rejection or withdrawal leaves the matter as if no offer had been made. A proposal to accept, or an acceptance, upon terms varying from those offered, is a rejection of the offer, and puts an end to the negotiation, unless the party who made the original offer renews it, or assents to the modifications suggested. The other party having once rejected the offer cannot

afterward revive it by an acceptance of it." Gray, J., in *R. R. Co. v. Mill Co.*, 119 U. S. 149; *Hough v. Brown*, 19 N. Y. 111; *Briggs v. Sizer*, 30 N. Y. 647.

Q. A lost certain property and offers \$500 to the finder as a reward. B, knowing nothing of the reward, finds the property and returns it to A. B afterwards learns of the reward, and brings an action against A for the same. Judgment for whom?

A. Judgment for A. "To the existence of a contract there must be mutual assent, or in another form, offer and consent to the offer. The motive inducing consent may be immaterial, but the consent is vital. Without that there is no contract. How then can there be consent or assent to that of which the party has never heard? But the plaintiffs did not, in giving that information, manifest any assent to the defendant's offer, nor act in any sense in reliance thereon, they did not know of its existence. The information was voluntary, and in every sense (material to this case) gratuitous. The offer could only operate upon the plaintiffs after they heard of it." Woodruff, J., in *Fitch v. Snedaker*, 38 N. Y. 248. To entitle a person to a reward offered for the recovery, or for information leading to the recovery of property lost, he must show a rendition of the services required after a knowledge of, and with a view of obtaining the offered reward. *Howland v. Lounds*, 51 N. Y. 604; *Atwood v. Armstrong*, 102 App. Div. 601.

Q. On May 1st, W advertises in the Herald a reward of \$1,000 to any person who captures or gives information leading to the apprehension of a certain thief. On May 3d, A publishes in the same paper a revocation of his offer. On May 4th, B succeeds in apprehending the thief. He now claims the reward, and brings suit to recover the sum offered. Can he recover? State your reasons.

A. B cannot recover, as the offer was withdrawn before the act asked for was performed. An offer may always be withdrawn before it is accepted, through the same source and in the same manner in which it was made. "It is not to be doubted

that the offer was revocable at any time before it was accepted, and before anything was done in reliance upon it. There was no contract until its terms were complied with. Like any other offer of a contract, it might, therefore, be withdrawn before rights had accrued under it; and it was withdrawn through the same channels in which it was made. The same notoriety was given to the revocation that was given to the offer; and the findings of fact do not show that any information was given by the claimant, or that he did anything to entitle him to the reward offered, until five months after the offer had been withdrawn. True, it is found that then, and at all times until the arrest was actually made, he was ignorant of the withdrawal; but that is an immaterial fact. The offer of the reward not having been made to him directly, but by means of a published proclamation, he should have known that it could be revoked in the manner in which it was made." Strong, J., in *Shuey v. U. S.*, 92 U. S. 73.

Q. A, the uncle of B, promised his nephew that if he would refrain from drinking, using tobacco, swearing and playing cards or billiards for money until he became twenty-one years of age, he would pay him the sum of \$5,000. The nephew assented thereto, and fully performed the conditions inducing the promise. When the nephew arrived at the age of 21 years, he demanded the money which was refused. He brings suit. The uncle demurs on the ground that the contract was without consideration to support it, and therefore invalid. Judgment for whom and why?

A. Judgment for B, the nephew. Refraining from drinking, using tobacco, etc., was the giving up of a legal right, and therefore constituted a sufficient consideration. "A valuable consideration in the sense of the law may consist either in some right, interest, profit or benefit accruing to the one party, or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other. Courts will not ask whether the thing which forms the consideration does in fact benefit the promisee or a third party, or is of any substantial

value to anyone. It is enough that something is promised, done, forborne, or suffered by the party to whom the promise is made as consideration for the promise made to him." Anson's Prin. of Contracts, 63. "In general, a waiver of any legal right at the request of another party, is a sufficient consideration for a promise." Parsons on Contracts, 444. "Now applying this rule to the facts before us, the promisee used tobacco, occasionally drank liquor, and he had a legal right to do so. That right he abandoned for a period of years upon the strength of the promise of the testator that for such forbearance he would give him \$5,000. It is sufficient that he restricted his legal freedom of action within certain prescribed limits upon the faith of the uncle's agreement, and now having fully performed the conditions imposed, it is of no moment whether such performance actually proved a benefit to the promisor, and the court will not inquire into it; but were it a proper subject of inquiry, we see nothing in this record that would permit a determination that the uncle was not benefited in a legal sense." Parker, J., in *Hamer v. Sidway*, 124 N. Y. 538.

Q. Sailors are hired for a certain voyage for \$100; in the midst of a storm, the sailors refuse to navigate the ship unless the captain agrees to pay them \$150. The captain has authority to bind the owner; he submits to their demands, but when he reaches shore, the owners refuse to pay but \$100; one of the sailors sues for \$150. Can he recover and why?

A. No. The agreement is void for want of consideration. There was no consideration for the pay promised to the sailors who remained with the ship. Before they sailed, they had undertaken to do all they could under all the emergencies of the voyage. They had sold all their services till the voyage should be completed. They were bound by the terms of their original contract to exert themselves to the utmost to bring the ship in safety to her destined port. "The promise to give higher wages is void for want of consideration. The seamen had no right to abandon the ship at Beaufort, and a promise to pay them an extra price for abstaining from doing an illegal

act was a nudum pactum." Spencer, J., in *Bartlett v. Wyman*, 14 Johns. 260. A promise by one to do that which he is under a legal obligation to do, will not constitute a consideration to support a contract. *Carpenter v. Taylor*, 164 N. Y. 177.

Q. A is indebted to B in the sum of \$1,000. B agrees that if A will pay him \$750 he will receipt him in full. A pays the money, but B refuses to give the receipt, and sues A for the balance of \$250. Can he recover?

A. Yes. There was no consideration for B's promise to give the receipt, as B was already legally bound to pay the entire sum. In order to have consideration, there must be the waiver of a legal right; doing what one is already legally bound to do can constitute no consideration. Wherever as here, the claim is liquidated, the mere acceptance of a part with a promise to discharge the whole is not enough, for there is no new consideration. *Bunge v. Koope*, 48 N. Y. 225; *Komp v. Raymond*, 175 N. Y. 102; *Sarve v. Dairy Co.*, 180 N. Y. 371.

Q. A owed B \$1,000. B agreed to give A a receipt in full if A would pay \$800. A paid the sum and received a receipt in full. Thereafter B sued A for \$200. Can he recover? Give reasons.

A. Yes. There was no consideration for the giving of the receipt, as A only paid what he was legally bound to pay. Where upon payment of a portion on an undisputed amount, the creditor gives a receipt in full, he is not concluded thereby from recovering the balance, although the receipt was given with knowledge and there was no error or fraud. *Ryan v. Ward*, 48 N. Y. 204; *Kromer v. Heim*, 75 N. Y. 574; *Bandman v. Finn*, 185 N. Y. 519.

Q. A, a physician, sent B a bill for \$500 for professional services. There had been no agreement as to the price to be paid. B, on receiving the bill, sent a letter to A, not disputing the services, but questioning the justice of the charges and inclosing a check for \$350, which he stated was in full satis-

faction of A's claim. A made no reply, but retained the money. He subsequently sues to recover \$150 as balance due. Judgment for whom and why?

A. Judgment for B, as there was an accord and satisfaction of A's claim. Where a debtor offers a certain sum of money, in full satisfaction of an unliquidated demand, and the creditor retains and accepts the money, his claim is cancelled, and no protest, declaration or denial on his part can vary the result. *Fuller v. Kemp*, 138 N. Y. 231. "An accord and satisfaction requires a new agreement and the performance thereof. It must be an executed contract founded upon a new consideration. If the claim is liquidated, the mere acceptance of a part with a promise to discharge the whole is not enough, for there is no new consideration. If the claim is unliquidated, the acceptance of a part, and an agreement to discharge the entire debt furnishes a new consideration which is founded in the compromise. A demand is not liquidated even if it appears that something is due, unless it appears how much is due and when it is admitted that one or two specific sums are due, but there is a genuine dispute as to which is the proper amount, the amount is regarded as unliquidated, within the meaning of that term as applied to the subject of accord and satisfaction. Plaintiff was either bound to accept the check or by accepting it, to accede to the defendant's terms. The money tendered belonged to the defendants, and they had a right to say on what conditions it should be received. When plaintiff indorsed and collected the check referred to in the letter asking him to sign the indorsed receipt in full, it was the same in legal effect, as if he had signed and returned the receipt, because acceptance of a check was a conclusive election to be bound by the condition upon which the check was offered. The use of the check was ipso facto an acceptance of the condition. The minds of the parties then met so as to constitute an accord." *Vann, J., in Nassoii v. Tomlinson*, 148 N. Y. 326.

Q. A owes B \$500. B needs the money and demands it from A. A refuses, but agrees that if B will extend the time

of payment of a note of A's held by B for six months, he (A) will pay the \$500 then and there. B agrees and takes the \$500, but at the date of the maturity of the note refuses to extend the time of payment, and now consults you as to his rights. Can he bring action on the note?

A. Yes. There was no consideration for the extension of the time of payment, as A was under a legal obligation to pay the money at the time. *Cary v. White*, 52 N. Y. 138; *O'Brien v. Fleckenstein*, 180 N. Y. 354.

Q. A was indebted to B in the sum of \$1,000. They agreed between themselves that A should pay to B \$500 in cash, and also give to him a certain horse for which A was offered \$250. B took the horse and cash in full for his claim and gave a receipt accordingly. B was unable to sell the horse for more than \$200, which he did, and then sued A to recover the balance of his original indebtedness. A answers setting up the facts. B demurs. Judgment for whom, and if for B, for what amount? Answer fully.

A. Judgment for A. B cannot recover anything. There was a full accord and satisfaction. "While the payment of a sum less than the amount of a liquidated debt, under an agreement of the creditor to accept the same in satisfaction of the debt, forms no bar to the recovery of the balance, if there be some additional benefit or legal possibility of benefit to the creditor, this will be a sufficient consideration to support an agreement to accept the lesser sum in full payment. There must be something different to that which the recipient is entitled to demand, in the thing done or given, in order to support his promise. The difference must be real, but the fact that it is slight will not destroy its efficacy in constituting a consideration, for if the courts were to say that if the thing done in return for a promise was not sufficiently unlike that to which the promisor was already bound, they would in fact be determining the adequacy of the consideration. Thus the giving of a promissory note for a money debt, or the gift

of a horse, or a hawk, or a robe in satisfaction is good. Either of these things might be more beneficial to the creditor than money." Huffcut's *Anson on Contracts*, p. 69. "But it is held that where there is an independent consideration, or the creditor receives any benefit or is put in a better position, or one from which there may be legal possibility of benefit to which he was not entitled except for the agreement, then the agreement is not nudum pactum, and the doctrine of the common law to which he had adverted has no application." Andrews, J., in *Allison v. Abendroth*, 108 N. Y. 470. For an elaborate discussion of this question and a careful review of all the authorities, see the able opinion of Potter, J., in *Jaffray v. Davis*, 124 N. Y. 164.

Q. A dealer sold and delivered 200 barrels of flour to B, knowing him to be a friend of C's. C afterward wrote to A, saying to him that in consideration of the sale to B, he would pay if B did not. Can the dealer recover from C?

A. No. This is a past or executed consideration which is insufficient to support C's promise. The promise must be coextensive with the consideration. There must be something given in exchange for the promise. Where the thing has already been given, or the act done, obviously nothing is given in exchange for the subsequent promise, and is therefore gratuitous and unenforceable. The doctrine that a past or executed consideration will not support a subsequent promise has long been settled. *Chaffee v. Thomas*, 7 Cowen, 358; *Doty v. Wilson*, 14 Johns. 378.

Q. A owed B \$1,000. B was about to bring an action for the amount, when C promised to pay him \$200 additional in consideration of his forbearance to sue A. B does as requested, but C refuses to pay. B sues C on the promise. Can he recover? Answer fully.

A. B can recover. An agreement to withhold suit is a good consideration to support a promise to pay a debt, although no fixed and definite time is expressly agreed upon. *Traders'*

Nat. Bank v. Parker, 130 N. Y. 415. "There is no doubt, that an agreement by the creditor to forbear the collection of a debt presently due is a good consideration for an absolute or conditional promise of a third person to pay the debt, or for any obligation he may assume in respect thereto. Nor is it essential, that the creditor should bind himself at the time to forbear collection or to give time. If he is requested by his debtor to extend the time and a third person undertakes in consideration of forbearance being given, to become liable as surety or otherwise, and the creditor does in fact forbear in reliance upon the undertaking, although he enters into no enforceable agreement to do so, his acquiescence in the request and an actual forbearance in consequence thereof for a reasonable time furnishes a good consideration for a collateral undertaking. In other words, a request followed by performance is sufficient, and the mutual promises at the time are not essential, unless it was the understanding that the promisor was not to be bound, except on condition that the other party entered into an immediate and reciprocal obligation to do the thing requested." Andrews, Ch. J., in *Strong v. Sheffield*, 144 N. Y. 392. See also *Muir v. Greene*, 191 N. Y. 204.

Q. A threatens to sue B for \$1,000, believing his claim to be valid. B promises to pay \$400 in full settlement, to which A agrees, and they compromise. Afterwards it turns out that A has no cause of action, and B refuses to pay the \$400. A brings suit to recover the \$400. Judgment for whom and why?

A. Judgment for A. As A honestly believed his claim to be doubtful his forbearance to sue was a sufficient consideration for B's promise to pay. It is not necessary to uphold a promise, based upon the surrender or compromise of a claim, to show that the claim was valid or enforceable at law. The settlement of a doubtful claim is a good consideration. *White v. Hoyt*, 73 N. Y. 505; *Zoebisich v. Van Minden*, 120 N. Y. 406; *Core v. Stokes*, 156 N. Y. 505. But if the claim be not even doubtful in that there is no reason for an honest belief that it has some foundation in law or equity, then forbearance applied to it is

not good consideration. *Springstead v. Nees*, 125 App. Div. 232.

Q. A loaned money to B, on his (B's) promise to pay the same to C, to whom A said he owed and had promised to pay a like sum. Can he recover? What principle of law is involved?

A. Yes. The well-known principle of *Lawrence v. Fox*, 20 N. Y. 268, applies, where it was held that a third person for whose benefit a contract was made between two others, could maintain an action thereon, when there is an obligation existing between that third person and the promisee. This case, despite many criticisms and modifications, continues to represent the law of this state on this question. "In such a case, however, it must appear that, when the contract was made, some obligation, or duty, was owing from the promisee in the contract to the party to be benefited. It is not sufficient that the performance of the contract may benefit a third person. It must have been entered into for his benefit and the promisee must have a legal interest that it be performed in favor of the third person." *Embler v. Ins. Co.*, 158 N. Y. 436.

Q. A, the owner of real property on which B holds a mortgage of \$2,000, gives a deed to C as security for \$1,000 prior indebtedness and for future advances which C may make, C agreeing by the terms of the deed to assume the payment of B's mortgage. C quitclaimed to D in consideration of D's agreement to pay the \$1,000 due C from A. D knew the terms of the transaction between A and C in which title was not intended to pass. D claims that C must pay B's mortgage, and B claims that C is liable for any deficiency which may arise on foreclosure of B's mortgage. C refuses to pay. Is he liable?

A. C is liable. The other requirement of the principle laid down in *Lawrence v. Fox*, *supra*, an obligation due from the promisee to the beneficiary under the contract is here present, for the promisee (mortgagor) is personally indebted to the mortgagee, and it is his personal indebtedness that is secured by the mortgage on the lands, the payment of which has been

assumed by C. In this case, the courts say, that the clause of assumption or contract made between the mortgagor and his grantee, is for the benefit of the mortgagee, and that as a consequence, the mortgagee may institute an action thereon directly against the promisor. *Burr v. Beers*, 24 N. Y. 178; *Durnherr v. Rau*, 135 N. Y. 219.

Q. A mortgage was executed by A who then owned the mortgaged premises. He then conveyed the mortgaged premises to B, who took the property subject to the mortgage. B conveys to C, who assumes the payment of the mortgage. The mortgagee forecloses, and seeks to enter a deficiency judgment against C. May he do so?

A. No. The requirements of the principle of *Lawrence v. Fox*, *supra*, are not here present. There must exist some legal or equitable obligation between the promisee and the third party. As B was not liable to the mortgagee, he not having assumed the payment of the mortgage, his grantee (C) cannot be held liable on the assumption, for there was no legal obligation existing between B (the promisee) and the third party (the mortgagee). "To give a third party who may derive a benefit from the performance of the promise, an action, there must be, first, an intent by the promisee to secure some benefit to the third party, and second, some privity between the two, the promisee and the party to be benefited, and some obligation or duty owing from the former to the latter which would give him a legal or equitable claim to the benefit of the promisee, or an equivalent from him personally. It is true that there need be no privity between the promisor and the party claiming the benefit of the undertaking, nor is it necessary that the latter should be privy to the consideration of the promise, but it does not follow that a mere volunteer can avail himself of it. A legal obligation or duty of the promisee to him, will so connect him with the transaction as to be a substitute for any privity with the promisor, or the consideration of the promise, the obligation of the promisee furnishing an evidence of the intent of the latter to benefit him, and creat-

ing a privity by substitution with the promisor. A mere stranger cannot intervene and claim by action the benefit of a contract between other parties. There must be either a new consideration or some prior right or claim against one of the contracting parties by which he has a legal interest in the performance of the agreement." Allen, J., in *Vrooman v. Turner*, 69 N. Y. 280. Also followed in *Carter v. Holahan*, 92 N. Y. 498; *Wheat v. Rice*, 97 N. Y. 302; *Pond v. New Rochelle Water Co.*, 183 N. Y. 335.

Q. A and B belonged to the same lodge. B paid A's dues as he did not want A to be dropped from membership, A at the time being in Europe. When A returned he promised to pay B the money back, but did not do so. B brings suit. Can he recover?

A. No. There was no consideration for A's promise. While A was under a moral obligation to pay B the money, it does not in law constitute a consideration to support a promise, and therefore B cannot recover. *Bartholomew v. Jackson*, 20 Johns. 28.

Q. A writes a letter to B, offering to employ him for ten months at \$50 per month. B telegraphs A accepting the offer, and says that he will reduce the contract to writing the next day. Thereafter B presents himself at A's place of business, and announces his readiness to perform; but A has already employed C in his stead. B brings suit against A. Can he recover?

A. Yes. Where by means of letters and telegrams exchanged between the parties, a clear and definite proposition containing all the requirements of a completed contract, is made by one and accepted by the other, with the understanding that the agreement shall be expressed in formal writing, the parties are bound by the contract as made by the correspondence. When the parties intend that a mere verbal agreement shall be finally reduced to writing as the evidence of the terms of the contract, it may be true that nothing is binding upon either party until the writing is executed. But here the contract

was already in writing, and it was none the less obligatory upon both parties because they intended that it should be put in another form. The principle governing such cases was well stated by Selden, J., in *Pratt v. H. R. R. Co.*, 21 N. Y. 308, as follows: "A contract to make and execute a certain written agreement, the terms of which are mutually understood and agreed upon, is in all respects as valid and obligatory, where no statutory objection interposes, as the written contract itself would be, if executed. If, therefore, it should appear that the minds of the parties had met; that a proposition for a contract had been made by one party and accepted by the other; that the terms of this contract were in all respects definitely understood and agreed upon, and that a part of the mutual understanding was that a written contract embodying these terms should be drawn and executed by the respective parties, this is an obligatory contract, which neither party is at liberty to refuse to perform." "In this case, it is apparent, that the minds of the parties met through the correspondence, upon all the terms as well as the subject-matter of the contract, and that the subsequent failure to reduce this contract to the precise form intended, did not affect the obligation of either party which had already attached, and they may now resort to the primary evidence of their mutual stipulations." *Sanders v. Pottlitzer Fruit Co.*, 144 N. Y. 209.

Q. A enters into an oral agreement with B, whereby the latter agrees to paint a certain house in not more than fourteen months. B works five months and then is arbitrarily discharged by A, who claims that the contract is void under the Statute of Frauds. Can B recover on this contract?

A. Yes. This agreement is valid. The Statute of Frauds provides that every agreement which by its terms is not to be performed within one year from the making thereof, shall be void, unless it, or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent. This agreement may be performed within one year, and is therefore valid. "An agreement to

save the Statute of Frauds need not be in writing, although by the terms of it, the party may at his election perform the agreement after the year; it is only when it appears by the whole tenor of the agreement that it is to be performed after the year, that a note in writing is necessary." *Plimpton v. Curtis*, 15 Wend. 336. "The statute, as interpreted by the courts, does not include agreements, which may or may not be performed within one year from the making thereof, but merely those which within their terms and consistent with the rights of the parties, cannot be performed within one year from the making thereof." *Allen, J., in Kent v. Kent*, 62 N. Y. 560, 564.

Q. A enters into an oral agreement with B on March 31st, 1910, whereby he agrees to do certain services for one year to commence on the first day of April, 1910. A does the work and upon B's failure to pay for the same, brings suit in which B sets up the Statute of Frauds as a defense. Judgment for whom and why?

A. Judgment for B. "To hold that a contract made on the 31st day of March for services for one year, to commence on the 1st day of April, was not within the Statute of Frauds, would be to evade and not to execute the statute. The mandate of the statute is positive that an agreement that, by its terms is not to be performed within one year from the making thereof shall be void, unless it is evidenced by some writing signed by the party to be charged therewith. It is not apparent to us how it can be fairly held that a contract for a full year's service can be performed within one year from the making thereof, when it was made on a day previous to the commencement of the year. If the statute can be thus extended for one day, why can it not be extended indefinitely?" *Billington v. Cahill*, 51 Hun, 132. "When a verbal agreement is entered into for the work and labor of one of the parties for a year, to commence in the future, an entry upon the employment, with the acquiescence of the employer, but without a new contract, does not take the case out of the Statute of Frauds,

and the employer is not liable under the contract." *Oddy v. James*, 48 N. Y. 685.

Q. A makes a contract with B, by which, for a certain price, A was to repair the boilers of B's factory; price to be paid when the boilers as fixed, have proved to B's satisfaction, to be a success. The boilers were fixed, and B used them a reasonable length of time without objection. In an action for the price, B defends on the ground that the boilers are not satisfactory. Can A recover?

A. Yes. The defense is untenable. "A simple allegation of dissatisfaction, without a good reason therefor, is no defense. Under such a contract, that which the law will say a contracting party ought in reason to be satisfied with, that it will say he is satisfied with." *Duplex Boiler Co. v. Garden*, 101 N. Y. 387. "There is no doubt of the general rule that, where one party agrees to do a certain thing to the satisfaction of the other, and the excellence of the work is a matter of taste, such as for instance, a portrait, bust, suit of clothes, dramatic play, or a piece of furniture, the employer may reject it without assigning any reason for his dissatisfaction. In such a case, the law cannot relieve against the folly of the employee, by inquiring whether the dissatisfaction of the employer was based upon reasonable grounds or not. It is even doubtful, whether it can inquire into the good faith of the employer's decision. The parties must stand to their contract as they made it, and if one party agrees to furnish an article that is satisfactory to the other, he constitutes the latter the sole arbiter of his own satisfaction. If, however, the task to be performed does not involve a matter of taste, but of common experience, as an ordinary job of mechanical work or quality of material, the law will say, what in reason ought to satisfy him, does satisfy him." *McAdam, J., in Gray v. Alabama Bank*, 10 N. Y. Suppl. 5; *Crawford v. Pub. Co.*, 163 N. Y. 404.

Q. A and B entered into a contract by which B was to build a house for A. A was to pay \$1,000 upon its completion, and

B was to present to him a certificate from X, an architect, that the house as built, fully complied with the terms of the contract. B duly completed the house, but the architect, having a grudge against B, refused to deliver the certificate. B brings suit to recover the \$1,000. Can he recover?

A. Yes. Where a contractor in a building contract has substantially performed, although by the contract he is bound to procure an architect's certificate of performance, he may recover without procuring such certificate, by showing an unreasonable refusal of the architect to give it. "It is a general rule of law, that a party must perform his contract before he can claim the consideration due him upon performance; but the performance in all cases need not be literal and exact. It is sufficient that the party bound to perform, acting in good faith, and intending and attempting to perform his contract, does so substantially, and then he may recover for his work, notwithstanding slight or trivial defects in performance, for which compensation may be made by an allowance to the other party. Whether a contract has been substantially performed, is a question of fact, depending upon all the circumstances of the case to be determined by the trial court." *Nolan v. Whitney*, 88 N. Y. 648; *Desmond Co. v. Friedman Co.*, 162 N. Y. 486.

Q. A entered into a contract with B, whereby B agreed to purchase fifty slaughtered steers to be delivered immediately, and fifty live steers to be delivered two months later. The price agreed upon was \$20 per head for the live steers and \$25 per head for the slaughtered steers. The slaughtered steers were delivered by A, but he failed to deliver the others. A sues B for the price of those delivered. B defends on the ground that the contract was entire, and that performance of the contract by A in all its terms was a condition precedent to his recovery. What are the rights of the parties?

A. A can recover the price of the slaughtered steers, subject to a counterclaim for B's damages for breach of contract as to

the live steers. "It is a question of intention, whether the several parts of a contract made at one and the same time are to be taken distributively and are independent, or whether entire performance by one party of all stipulations on his part, is a condition precedent to his right of recovery against the other party in respect to a portion of the contract which he has fully performed." *Tipton v. Feitner*, 20 N. Y. 423. "A contract is entire, when the parties intend that the promise by one party is conditional upon entire performance of his part of the contract by the other party. A contract is said to be severable, when the part to be performed by one party consists of several and distinct items, or is left to be implied by law." *Ming v. Corbin*, 142 N. Y. 334. "Indeed the entirety or divisibility of several items is always a question of intent and frequently one of fact. No precise rule can be given by which this question in a given case may be settled. Like most other questions of construction, it depends upon the intention of the parties, and this must be discovered in each case by considering the language employed and the subject-matter of the contract." *Silberman v. Fretz*, 16 Misc. 449.

Q. A agrees by written contract to deliver 1,200 tons of steel to B in lots of 100 tons each on twelve successive days at a specified price per ton, B agreeing to furnish security for the purchase price before the first delivery. Six lots of the steel are delivered on six successive days and B pays cash on delivery of each lot, but no security is given by B as he agreed. On the seventh day steel advances in price and A refuses to complete the contract. B then offers A the purchase price of the remaining 600 tons, but A refuses to accept the same. What are the rights of the parties? Answer fully.

A. A, by not insisting on the security being given, waived B's breach; A therefore cannot refuse to perform. "Where a breach of contract by one party occasions an injury to the other which is susceptible of compensation in damages, it does not relieve the latter from liability under the contract, where both parties have gone on and performed it for some

time thereafter. And if he is entitled to the strict enforcement of his contract, but has led the other party to the belief that he will not exact it, he thereby waives his right to a strict performance." 3 Amer. & Eng. Ency. of Law (2d Ed.), 154; Copley Iron Co. v. Pope, 108 N. Y. 232; Pakas v. Hollingshead, 184 N. Y. 211.

Q. A promises to marry B on January 1st, 1910. On May 1st, 1909, he marries C. B immediately sues A for breach of promise. A's defense was that the action was prematurely brought. Judgment for whom and why?

A. Judgment for B. An action for breach of promise will lie at once, where one party has voluntarily placed it beyond his power to perform, or upon a positive refusal to perform a contract of marriage, although the time specified for the performance has not arrived. Burtis v. Thompson, 42 N. Y. 246.

Q. A, an actor, was engaged by B, a theatrical manager, on August 15th, to perform at his theater for twenty weeks commencing September 1st at \$100 per week. At the time specified A reported for rehearsals, but B repudiated his agreement and would not allow A to take part in the performances. A immediately sues B for \$2,000. Can he recover?

A. Yes. "Where a contract for future employment and service has been entered into, and upon the arrival of the time specified for the commencement of the service, the employee being ready and willing to perform, the employer absolutely repudiates the contract, this is equivalent to a refusal to allow the employee to enter upon the service, and is a breach of the contract. It is not necessary for the employee thereafter to tender his services or to keep himself in readiness to perform. His only further duty is to use reasonable care and diligence in entering into other employment of the same kind, and thus to reduce the damages. The remedy of the employee is not an action for wages, but to recover damages for the breach. The damages in such action is prima facie the amount of the wages for the full term. Where the contract is repudiated

by the employer prior to the time for entering into the service, the employee has an immediate cause of action, and it is not necessary to aver a readiness to perform at the specified time. It is at the option of the employee either to treat the contract as thus broken, or as still subsisting; in the latter case he may offer to perform on the day specified for the commencement of the service. The rule of damages in either case is the same." *Howard v. Daly*, 61 N. Y. 362; *Weed v. Burt*, 78 N. Y. 193; *Kelly v. Ins. Co.*, 186 N. Y. 19.

Q. B makes an agreement with A for the purchase of 1,000 yards of silk at \$1 per yard, to be delivered June 15th, 1910. On June 1st, 1910, B meets A and tells him that he cannot use the silk, and that he need not send the same. A consults you. What are his rights, and what is the measure of damages if any?

A. A can sue immediately, and the measure of damages is the difference between the contract price and the market price at the time and place of delivery. "Where before the time of delivery fixed by a contract for the sale of goods, the vendee notifies the vendor that he will not receive or pay for the goods, and requests him to stop any further efforts to carry out the contract, the vendor is justified in treating the contract as broken at that time, and is entitled to bring an action for the breach immediately without tendering delivery; it is not necessary to await the expiration of the time of performance fixed by the contract, nor can the vendee retract his renunciation of the contract, after the vendor has acted upon it and by sale of the goods to other parties has changed his position." *Windmuller v. Pope*, 108 N. Y. 674; *Nichols v. Scranton Steel Co.*, 137 N. Y. 471.

Q. A agrees with B to deliver to him at his store in three days, fifty barrels of salt at \$3 per barrel. The next day salt falls in price, and B refuses to accept the salt upon its delivery. What are A's rights?

A. A can sue for breach of contract; the damages recoverable being the difference between the contract price and the

market value of the goods at the time and place of delivery. *Dana v. Fiedler*, 12 N. Y. 40; *Cohen v. Platt*, 69 N. Y. 348.

Q. A and B enter into a contract on May 1, 1910, whereby the latter agrees to buy of A a certain farm, title to be given and purchase price paid January 1, 1911. On October 1, 1910, a barn on the farm, which is not worth much, burns. On January 1, 1911, A tenders deed, but B refuses to accept or pay the contract price. A sues B for damages. Can he recover?

A. No. The agreement had reference to the existence of the property in substantially the same condition, reasonable wear and tear excepted, as it was at the time, and performance of the agreement by the vendor being rendered impossible by the fire, the vendee was not bound. He was entitled to the property in the condition it was when the agreement was made, and a refusal to take the property after the barn had been destroyed by fire was not a breach of the contract. *Smyth v. Sturges*, 108 N. Y. 495; *Goldman v. Rosenberg*, 116 N. Y. 78.

Q. A agrees by written contract to employ B at \$10 per week for an indefinite time, and B agrees to give A three weeks' notice in writing before leaving or forfeit \$200. B works for twenty weeks without drawing salary, and then leaves without giving A any notice. B sues A to recover \$200 as salary due. A sets up the agreement as a defense. Judgment for whom and why?

A. Judgment for B. The contract is void for want of mutuality. A did not agree to employ B for any definite time, therefore the contract is void, and B was not obliged to work for any definite time, and could leave when he pleased without incurring any liability. *Tucker v. Woods*, 12 Johns. 190. The contract would also be avoided on the ground that the forfeiture named in the contract is a penalty, being greater than the actual loss suffered. "Where the parties to a contract stipulate for a payment in liquidation of damages by a party in default, if the damages are in their nature uncertain and incapable of exact ascertainment, and may be dependent upon extrinsic

consideration and circumstances, and the amount is not upon the face of the contract out of all proportion to the probable loss, it will be treated as liquidated damages. The fact that the sum agreed to be paid is termed by the parties a penalty, is not controlling upon the question of construction. It seems, however, that when the sum is disproportionate to the presumable or probable damage, or to a readily ascertainable loss, the courts will treat it as a penalty, and will relieve upon the principle that the precise sum was not the essence of the agreement, but was in the nature of a security for performance." Gray, J., in *Ward v. H. R. Bridge Co.*, 125 N. Y. 230.

(NOTE.) "Where a contract for a municipal improvement requires the contractor to pay a certain sum a day, as liquidated damages, for each day the completion of the work is delayed beyond a specified date, the municipality will not be allowed to retain from the contractor a substantial sum under the guise of liquidated damages for delay when in fact only nominal damages have been sustained." *McCann v. City of Albany*, 158 N. Y. 634; *Caesar v. Robinson*, 174 N. Y. 492.

Q. A was employed by B at a salary of \$1,000 per annum, nothing more being said. A only worked for B for two months when he left. B refused to pay A the two months' wages, and upon A bringing suit for the same, B set up the agreement as a defense. Judgment for whom and why?

A. Judgment for A. "A general or indefinite hiring does not import an employment by the year. A hiring at so much a year, no time being specified, is an indefinite hiring; and such a hiring is a hiring at will, and may be terminated by either party." *Martin v. N. Y. Ins. Co.*, 148 N. Y. 117; *Outerbridge v. Campbell*, 87 App. Div. 597.

Q. A and B agreed to corner the price of wheat in the market, and thus raise the price. They each deposit the sum of \$5,000 with C, as a forfeiture for a failure to perform by either one of them. A does not perform, and B sues C for the \$10,000. A also sues C for the return of the \$5,000. What are the rights of the parties?

A. As this contract is illegal, being in restraint of trade,

B cannot recover the \$10,000, but can get a return of his \$5,000. The contract being illegal, and therefore void, is not enforceable. See 15 Amer. & Eng. Ency. of Law (2d Ed.), 1007. See also *Merritt v. Millard*, 4 Keyes (N. Y.), 208; *Woodworth v. Bennett*, 43 N. Y. 273.

Q. On January 1, 1905, A and B entered into a written contract whereby A agreed to sell to B 500 barrels of flour at the then market price; the contract also provided that B waived the delivery of the flour, and that a settlement should be made July 1, 1905, A to pay B for any increase and B to pay for any decrease in the price of flour. On July 1, 1905, flour was \$1 per barrel higher. B demands from A that he should pay him \$500, which A refuses. What are the rights of the parties? State your reasons.

A. B cannot recover anything from A, as this contract was a wager and therefore void. "To render a contract for the purchase and sale of property void as a wagering contract, it must appear to have been the understanding when the contract was made that the property should not be delivered, and that only the difference in the market price should be paid or received." *Kingsbury v. Kirwan*, 77 N. Y. 612; *Springs v. James*, 137 App. Div. 117.

Q. A agreed orally to sell to B a certain house and lot, and to do painting thereon for \$40,000. B paid the money, and A conveyed the house and lot by deed properly executed, but failed to perform the labor as agreed. He sues for breach of contract, and A sets up the Statute of Frauds. Judgment for whom and why?

A. Judgment for A. The Statute of Frauds is a good defense, as a contract for the sale of land must be in writing, and where one part of a contract is void by the Statute of Frauds, the whole contract is void. In this case, the sale was void under the Statute of Frauds, and therefore the entire contract was void. The sale was legalized by the delivery of the deed, but the work to be done was not, and as there was one con-

sideration for both, the clauses cannot be separated, and the action cannot be maintained. *Dow v. Way*, 64 Barb. 255; *DeBeerski v. Paige*, 36 N. Y. 537; *Day v. N. Y. C. R. R. Co.*, 51 N. Y. 533; *Day v. McConnell*, 133 N. Y. 425.

Q. A offered B \$5,000 for his farm consisting of a house, barn and cattle contained in the barn. A gives B \$1,000 deposit to bind the bargain. B accepts and promises to give A a deed of the farm and a bill of sale of the cattle the next day. When B tendered the deed and bill of sale to A the next day, A refused to carry out his agreement and demanded the return of his deposit. Upon B's refusal to return the money, A brings action. Judgment for whom and why?

A. Judgment for B. A cannot recover the deposit back as he himself repudiated the agreement. The contract is void not being in writing as it is for the sale of land. Although the contract was also for the sale of personal property, the agreement is entire, founded upon one consideration and if not reduced to writing is void under the Statute of Frauds as well in respect to the personal property as to the real property. *Harsha v. Reid*, 45 N. Y. 420.

(NOTE.) "If one pays money, or renders services or delivers property upon an agreement condemned by the Statute of Frauds he may recover the money paid in an action for money had and received, and he may recover the value of his services and of his property upon an implied assumpsit to pay, provided he can show that he has been ready and willing to perform the agreement, and the other party has repudiated or refused to perform it." *Reed v. McConnell*, 133 N. Y. 435.

Q. A by written contract agrees to employ B for one year for 100 barrels of flour at \$10 per barrel. At the end of the year A refuses to give B the 100 barrels of flour, whereupon B sues A for \$1,000 in money. Can he recover?

A. Yes. Where a party agrees to pay the value of services rendered in specific chattels or articles of property, and upon demand refuses or fails to deliver the property, the obligation

is thereby converted into one for the payment of money. N. Y. News Pub. Co. v. Nat. S. S. Co., 148 N. Y. 39.

Q. A by written agreement, employs B to do certain work for one year at a salary of \$1,000 per annum. At the end of the year nothing further is said and B continues in the employ of A for several months when he is arbitrarily discharged by B. A brings action against B to recover \$1,000. Can he do so?

A. Yes. "When on the expiration of a written contract of employment for one year, the servant remains in the master's employ without agreement limiting the subsequent period of his employment, the law implies a renewal of the contract upon the same terms for another year." *Mendelson v. Bronner*, 124 App. Div. 396; *Weffinger v. Groh*, 112 App. Div. 250, aff'd in 185 N. Y. 610.

CHAPTER VII

Corporations

Q. State the difference between a corporation and a joint-stock company.

A. The distinction is very well drawn by Finch, J., in *People ex rel. v. Coleman*, 133 N. Y. 282, in the following language: "The debt of the corporation is its debt, and not that of its members, the debt of the joint-stock company is the debt of the associates however enforced; the creation of the corporation merges and drowns the liability of its corporators, the creation of the stock company leaves unharmed and unchanged the liability of the associates; the one derives its existence from the contract of individuals, the other from the sovereignty of the state. The two are alike, but not the same. More or less they crowd upon and overlap each other, but without losing their identity, and so, while we cannot say that a joint-stock company is a corporation, we can say that a joint-stock company is a partnership with some of the powers of a corporation." The distinguishing feature of the joint-stock company is the personal liability of its members. *Matter of Jones*, 172 N. Y. 575; *Hibbs v. Brown*, 190 N. Y. 193.

Q. A Brooklyn manufacturing company fails to take certain necessary steps required by law to create a corporation. Subsequently the corporation purchases \$2,000 worth of goods from A, and fails to pay for the same. A brings suit against the company to recover the amount of the purchase price. The company defends on the ground that it was not a corporation at the time the debt was contracted. Judgment for whom and why?

A. Judgment for A, as the corporation is estopped from deny-

ing its corporate existence, by reason of its having held itself out as a corporation. "The papers filed by which the corporation is sought to be created are colorable and so defective, that in a proceeding on the part of the state against it, it would for that reason be dissolved, yet by acts of user under such an organization it becomes a corporation de facto, and no advantage can be taken of such defect in its constitution collaterally by any person." *Buffalo R. R. Co. v. Cary*, 26 N. Y. 75.

Q. A corporation failed to file a duplicate certificate of incorporation as required by statute. A purchases goods from the corporation to the value of \$5,000, and in an action for the price by the corporation against him, he sets up the nonincorporation as a defense. Is the defense good? Give your reasons.

A. The defense must fail. "A party who has entered into a contract with another, in which the latter assumes to be and contracts as a corporation, is estopped from denying the corporate existence, and cannot resist an action brought by the corporation against him on the contract." *U. S. Vinegar Co. v. Schlegel*, 143 N. Y. 537. "To establish a corporation de facto against one who has recognized the corporate character by contracting with it, it is sufficient to show the existence of a law authorizing its formation, proceedings taken for that purpose in professed compliance with that law, and subsequent acts of user." *Methodist Church v. Pickett*, 19 N. Y. 482. See also *Bank of Keokuk v. Pfeiffer*, 108 N. Y. 242.

Q. Defendant was sued by plaintiff, a creditor of a corporation, to enforce defendant's liability as a stockholder thereof, for a debt contracted while the latter was a stockholder of record and managing director. Defendant answers that there was no such corporation, the same not having been incorporated according to statute. Plaintiff demurs. Judgment for whom and why?

A. The demurrer should be sustained. "A defect in the proceedings to organize a corporation is no defense to a stock-

holder sued to enforce his individual liability, who has participated in its acts of user as a corporation de facto, and appeared as a stockholder upon its books, when the debt for which he is sued was contracted." *Eaton v. Aspinwall*, 19 N. Y. 137.

Q. The New York statute requires a certificate of incorporation of a membership corporation to be signed by a justice of the supreme court and filed with the secretary of state, and also a copy with the county clerk. B contracted with the X Company as a corporation, and now seeks to hold the stockholders liable as partners, on the ground that as the corporation had failed to file a copy of its certificate of incorporation with the county clerk, the corporation was never legally incorporated. Can the stockholders be held as partners? Give reasons.

A. The stockholders are not liable as partners. "If an association assumes to enter into a contract in a corporate capacity, and a party dealing with the association contracts with it as if it were a corporation, the individual members of such association cannot be charged as parties to the contract, either severally, jointly, or as partners. This is equally true, whether the corporation was in fact a corporation, or not, and whether the contract with the association in its corporate capacity was authorized by the legislature or not. If an association undertakes to enter into a contract as a corporation, it is clear that the members of the association do not agree to be parties to the contract, either jointly or severally. They do not agree to be bound as partners, either to each other, or to the party contracting with the association. It is equally clear that the party contracting with the association does not intend to contract with its members individually. To treat the individual members of the association as parties to the contract, under the circumstances, would not only involve the nullification of the contract which was contemplated by the parties, but the creation of a different contract which neither of the parties intended to make." *Seacord v. Pendleton*, 55 Hun, 579. See also *Bank v. Walker*, 66 N. Y. 424.

Q. The X Savings Bank acting as agent for an undisclosed principal, employs A as broker to purchase and sell for it, cotton for future delivery. A purchases certain cotton for the bank which the latter refuses to take, on the ground that it had no power or authority to deal in cotton. A brings an action against the bank for his commissions. Can he recover?

A. No. "Speculative contracts entered into for the sale and purchase of stock by a savings bank at the stock board or elsewhere, subject to the hazard and contingency of gain and loss, are ultra vires and a perversion of the powers conferred by its charter. Contracts of corporations are ultra vires when they involve adventures or undertakings outside and not within the scope of power given by their charters. The plea of ultra vires will always prevail, unless it shall defeat justice or accomplish a legal wrong. The defense of ultra vires is not available if the contract be executed. But this doctrine has no application to executory contracts which are sought to be made the foundation of an action, or to contracts that are prohibited as against public policy. A corporation acting as the agent of an undisclosed principal, and so liable as principal, is entitled, when this liability is sought to be enforced, to all the rights and privileges that the law will give to it, if in fact it occupy the position of principal." Haight, J., in *Jemison v. Bank*, 122 N. Y. 135. See also *Gause v. Trust Co.*, 196 N. Y. 155.

Q. A purchased bonds of a railroad corporation and received as a bonus four shares of stock for each bond purchased. His purchase was made under an agreement with the X Bank that one-half of the purchase should be for the benefit of the bank. Upon A's refusal to deliver to the bank its share of the profits, the bank brings suit against A. Can it recover?

A. No. The contract was simply executory, and being ultra vires, the bank could not enforce it. The contract was ultra vires, because a corporation organized to carry on the business of banking, is not authorized to become a stockholder in a railroad corporation. *Sistare v. Best*, 88 N. Y. 527;

Nassau Bank v. Jones, 95 N. Y. 115; Appleton v. Bank, 190 N. Y. 417.

Q. The X Corporation, a railroad company, sells to the Y Company certain mirrors. In a suit for the contract price, the Y Company sets up that the X Company was not authorized to manufacture and sell the goods. Is the defense good? State your reasons.

A. No. While the contract is *ultra vires*, it being executed, the defense is of no avail. "Where a corporation has fully performed a contract on its part to manufacture and deliver certain articles, it is no defense to an action brought to recover the purchase price, that the contract was not within or incidental to its chartered powers and privileges, or for the purposes for which it was created." *Whitney Arms Co. v. Barlow*, 63 N. Y. 62. "A corporation cannot avail itself of the defense of *ultra vires*, when the contract has been in good faith fully performed by the other party, and the corporation has had the full benefit of the performance and of the contract." *Leinkauf v. Lombard*, 137 N. Y. 417.

Q. The X Company threatens to do an *ultra vires* act. A, a shareholder, objects and comes to you for advice. What are his rights?

A. He can restrain the act. A threatened abuse of the corporate powers may be arrested by the courts at the suit of a stockholder. So also, the shareholders may recover their damages against the officers who have diverted the capital to improper uses. *Bissel v. R. R.*, 22 N. Y. 258, 275; *Holmes v. Willard*, 125 N. Y. 75.

Q. A, together with B and C, was a promoter of a corporation. Realizing that the ownership of certain real estate would be necessary to the corporation when formed, he purchased it with his own money. He then united with others in forming the corporation. A subsequently sold the real estate to the corporation when formed, at an advance of 200% over the price paid by him therefor. He retained a portion of the prof-

its himself, and divided the remainder of the profits between B and C. At the time of the purchase of the land by the corporation, the other stockholders had no knowledge. Upon learning of the facts, they object. What, if any remedy, have they, and against whom can it be enforced? Give your reasons in full.

A. The stockholders can compel A, B and C to account as to the amount of profits they made. "Where several persons are engaged in a joint enterprise for their mutual benefit, each has a right to demand and expect from his associates good faith in all that relates to their common interests, and no one of them will be permitted to take to himself a secret and separate advantage to the prejudice of the others; and where one, unknown to his associates, causes to be transferred to the association property previously purchased by himself, at a price exceeding that paid by him therefor, he is accountable to his associates for the profits thus made. In this adventure the three are regarded as partners. It matters not that the title to the lands was not in all the partners; after partners have divided the profits between them, they are certainly in no position to deny the existence of the partnership, and all are accountable for the profits to the corporation." *Getty v. Devlin*, 54 N. Y. 403, and 70 N. Y. 504. See also *Brewster v. Hatch*, 122 N. Y. 349.

(NOTE.) "It is only where the promoter informs every subscriber, or the director informs every fellow director and stockholder that he is personally interested in and the amount of profits he expects to make on a sale to the corporation, that a promoter or director will be permitted to retain or make a profit on such sale; and the burden is upon him to show that he took no advantage of his fellow subscribers or stockholders. Where only a part of the directors or stockholders have notice or knowledge of a sale of real estate made by a promoter and director to the corporation, the latter cannot retain an individual profit, but must account therefor to the corporation in an action brought against him by it." *Colton Imp. Co. v. Richter*, 26 Misc. 26. See also *Munson v. R. R. Co.*, 103 N. Y. 58; *Sage v. Culver*, 147 N. Y. 247; *Redhead v. Club*, 148 N. Y. 471.

Q. A is a stockholder in a corporation. There is an accumulation of profits in the treasury, but the directors wrongfully refuse to declare a dividend. Has A any remedy, if so, what?

A. A can bring action to compel the directors to declare a dividend. "Where the surplus profits of a corporation properly applicable to a dividend, are without doubt ample for the purpose, and the directors or a majority of them, acting in bad faith and without reasonable cause, refuse to declare a dividend, the courts will interfere in favor of those stockholders who otherwise would be without remedy." *Hiscock v. Lacy*, 9 Misc. 578. "When a corporation has a surplus, whether a dividend shall be made, and if made, how much it shall be, and when and where it shall be payable, rest in the fair and honest discretion of the directors, uncontrollable by the courts. If the discretion is not fairly and honestly exercised, the inference is that the courts should interpose in behalf of the injured stockholders." *Williams v. Western Union Tel. Co.*, 93 N. Y. 162. See also *McNab v. Mfg. Co.*, 62 Hun, 18; *aff'd* in 133 N. Y. 687; *Miller v. Perfumery Co.*, 125 App. Div. 883.

Q. The X Corporation was duly organized in the year 1912. Its directors named in its certificate of incorporation for the first year, held over, and continued as directors, because of their neglect and refusal to adopt by-laws to enable the stockholders to hold an annual election for directors in the year 1913. The said directors then employed B as the attorney for the corporation for the year 1913, at a salary of \$5,000. After the year 1913, a new board of directors was elected and refused to continue the services of B, and also refused to pay B for the services as attorney for the company for the year 1913. Upon suit by B against the corporation, who should have judgment and why?

A. Judgment for the corporation, as the contract for B's services was fraudulent and void according to sec. 27 of the Stock Corp. Law (Consolidated Laws, chap. 59), which is as follows: "When the directors of any corporation for the first year of its corporate existence shall hold over and continue to be directors after the first year, because of their neglect or refusal to adopt the by-laws required to enable the stockholders to hold the annual election for directors, all their acts and proceedings

while so holding over, done for and in the name of the corporation, designed to charge upon it any liability or obligation for the services of any such director, or any officer, or attorney or counsel appointed by them, and every such liability or obligation shall be held to be fraudulent and void."

Q. A certain question has arisen as to the validity of the election of the board of directors of the X Manufacturing Company by a plurality of the votes at the election for that purpose. What do you say?

A. The election is valid, according to sec. 25 of the Stock Corp. Law, which in part is as follows: "The directors of every stock corporation shall be chosen at the time and place fixed by the by-laws of the corporation, by a plurality of the votes at such election."

Q. A, who was not a stockholder of the X Corporation, was elected a director at a meeting duly held. The by-laws of the corporation, and the certificate of incorporation did not mention any qualifications for directors. Question arises as to the validity of A's election. What do you say?

A. The election is invalid, because sec. 25 of the Stock Corp. Law, provides in part that: "Each director shall be a stockholder unless otherwise provided in the certificate, or in a by-law adopted by a stockholders' meeting."

Q. The board of directors of the X Corporation borrowed \$25,000 upon the notes of the corporation. The corporation had no surplus profits. The money so borrowed was used for the purpose of making dividends upon the capital stock of the corporation, pursuant to a resolution of the board of directors, three of the ten directors dissenting. Discuss the legality of this act. Against whom, if any, can a liability therefor be enforced?

A. This question is fully answered by sec. 28 of the Stock Corp. Law, as follows: "The directors of a stock corporation

shall not make dividends, except from the surplus profits arising from the business of such corporation, nor divide, withdraw or in any way pay to the stockholders or any of them, any part of the capital of such corporation, or reduce its capital stock, except as authorized by law. In case of any violation of the provisions of this section, the directors under whose administration the same may have happened, except those who may have caused their dissent therefrom to be entered at large upon the minutes of such directors at the time, or were not present when the same happened, shall jointly and severally be liable to the corporation and to the creditors thereof to the full amount of any loss sustained by such corporation or its creditors respectively by reason of such withdrawal, division or reduction. But this section shall not prevent a division and distribution of the assets of any such corporation remaining after the payment of all its debts and liabilities upon the dissolution of such corporation or the expiration of its charter; nor shall it prevent a corporation from accepting shares of its capital stock in the complete or partial settlement of a debt owing to the corporation, which by the board of directors shall be deemed to be bad or doubtful." See *Dykeman v. Keeney*, 16 App. Div. 131, *aff'd* in 160 N. Y. 677.

Q. It is provided by the by-laws of a corporation that the manager shall not have the power to contract debts above the amount of \$1,000 without a vote of the board of directors. B, the manager, in violation of this provision of the by-laws, contracts with the X Company for certain goods to the amount of \$5,000. The corporation refuses to receive or pay for the goods, and upon being sued sets up as a defense that B exceeded his authority. Is the corporation liable?

A. The corporation is liable, as the act was within the apparent scope of B's authority. "It follows from the general principle now well settled, to the effect that third persons may act upon the apparent authority conferred by the principal upon the agent, and are not bound by secret limitations or instructions qualifying the terms of the written or verbal

appointment, that the defense based upon the limitation in the by-laws, of which the plaintiff had no knowledge, cannot be sustained. By-laws of business corporations are, as to third persons, private regulations binding as between the corporation and its members, but of no force as limitations per se as to third persons of an authority which, except for the by-laws, would be construed as within the apparent scope of the agency." *Rathbun v. Snow*, 123 N. Y. 343. See also *Powers v. Schlicht Co.*, 23 App. Div. 380, *aff'd* in 165 N. Y. 662.

Q. The directors of the X Corporation consisted of five members. When it became necessary for the passing of a resolution authorizing the treasurer to execute certain bonds for the corporation, the secretary prepared the required resolution and went to the residence of each of the directors to have them each assent to the passage of the said resolution, which they did in writing. Thereafter the secretary entered the resolution upon the minutes of the corporation as having been adopted by its board of directors. The treasurer then executed the bonds. What is your opinion as to the validity of the bonds? Answer fully.

A. The bonds are not valid, as they were not properly authorized. The resolution authorizing the treasurer to execute the bonds was improper, in that the assent of the directors was not obtained at a meeting called for that purpose. Corporate action can only be had by its governing board acting collectively and not singly, and even though all the members of the board of directors should assent to the resolution, this would not be proper corporate action. *Niagara v. Bachman*, 66 N. Y. 262; *Bank v. Church*, 109 N. Y. 512.

Q. A, B and C, directors of the X Corporation, make a contract for the manufacture of certain goods with D, the goods being those which the corporation was incorporated to manufacture and sell. Subsequently the stockholders have a meeting and refuse to accept the contract as that of the corporation. The directors side with the stockholders. What are the rights of D? Is the corporation liable?

A. The corporation is liable, as it is bound by the acts of its directors. The directors of a corporation are clothed with all the powers of the corporation, and are authorized to make any contract in its behalf that it is capable of making. *Hamilton Trust Co. v. Clemes*, 163 N. Y. 423.

Q. A was in the employ of the X Company as manager at a salary of \$2,000 per annum; he was hired under written contract for two years. At the end of the first year, the X Company was consolidated with the Y Company, and A was thrown out of employment. He brings action against the X Company who defend on the ground that they are not in existence. Judgment for whom and why?

A. Judgment for the X Company. "When a corporation is sued for services, it has a right to allege and prove as a complete defense that when the action was begun the corporation had ceased to exist because of its consolidation with another company, the new company assuming a different name and style." The plaintiff can sue the new company, and follow the assets of the old company in the new company. *Copp v. Colorado Iron Co.*, 29 Misc. 109; *Miner v. R. R.*, 123 N. Y. 242. "It is well settled that the effect of a merger is to dissolve the previous corporation into the new one, and to extinguish the precedent company." *Klein v. E. R. Light Co.*, 37 Misc. 491.

Q. The X Corporation divides a certain amount of its property among its shareholders, while various claims of its creditors are unliquidated. A, who is one of the creditors, sues the corporation and obtains judgment. He issues execution which is returned unsatisfied. A comes to you for advice. What are his remedies?

A. A can follow the property into the hands of the stockholders. "When the property of a corporation has been divided among its stockholders before all its debts have been paid, a judgment creditor after the return of an execution unsatisfied, may maintain an action in the nature of a creditor's

bill against a stockholder to reach whatsoever was so received by him. It is immaterial whether he got it by fair agreement with his associates, or by a wrongful act. A creditor is not required to bring a suit on behalf of other creditors who may choose to come in, or to make all stockholders parties to the action. Assets of a corporation are a trust fund for the payment of its debts, and its creditors have a lien thereon and a right to priority of payment over its stockholders." *Bartlett v. Drew*, 57 N. Y. 587. See also *Hurd v. N. Y. C. S. L. Co.*, 167 N. Y. 89; *Darcy v. Ferry Co.*, 196 N. Y. 99; *Hazard v. Wight*, 201 N. Y. 399.

Q. A, a creditor for the X Corporation, brings suit against the directors of the corporation for misappropriation of the corporate funds. The directors, desiring to make restitution, come to you and ask you to hinder and delay the suit until they have an opportunity to do so. They also ask you to defend on the ground that the creditor has no right to bring the suit. What would be your advice to them?

A. The defense that the creditor has no right to bring the suit is a proper one. The corporation itself is the proper party to bring the action. If it, however, after a demand refuses to do so, a stockholder may sue for himself and on behalf of all other stockholders. The creditor has no right to interfere with the affairs of a going corporation. There is nothing to show that his claim would not be paid. "An action against an officer of a corporation to recover damages for a fraudulent misappropriation and conversion by him of the corporate property, can only be brought by a stockholder in his own name, after application to and a refusal on the part of the corporation to bring the suit. In case of such refusal, the stockholder may bring an action for the benefit of himself and the other stockholders, but must make the corporation a party defendant, alleging in his complaint and proving the refusal." *Greaves v. Gough*, 69 N. Y. 156. See also *Flynn v. R. R. Co.*, 158 N. Y. 493; *O'Connor v. V. P. & P. Co.*, 184 N. Y. 52.

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Q. A owns ten shares of stock in the X Stock Corporation. At an election of directors he attempts to cast ten votes, but the person in charge of the election refuses to allow him to do so, claiming that each stockholder is entitled to but one vote. Is this contention valid? What are A's rights?

A. A can, by a writ of mandamus, compel the officers to permit him to cast ten votes as provided for by sec. 23 of the General Corp. Law (Consolidated Laws, chap. 23), which in part is as follows: "Unless otherwise provided in the certificate of incorporation, every stockholder of record of a stock corporation shall be entitled at every meeting of the corporation to one vote for every share of stock standing in his name on the books of the corporation; and at every meeting of a non-stock corporation, every member, unless disqualified by the by-laws, shall be entitled to one vote."

Q. A client states to you that he is a stockholder and director in a corporation whose annual meeting for the election of directors is about to be held; that he is about to be re-elected a director by the stockholders; that under the by-laws of the corporation a meeting of the new board of directors must be held immediately after the election of the directors by the stockholders; that he will be unable to attend either of said meetings, and desires you to represent him at the meetings of the stockholders and directors, and to vote in his stead at the election of the directors by the stockholders and at the subsequent meeting of the directors. What would you advise him?

A. A stockholder may vote by proxy, while a director cannot. Section 26 of the General Corp. Law, covers the question of proxy voting and is as follows: "Every member of a corporation, except a religious corporation, entitled to vote at any meeting thereof may so vote by proxy. No officer, clerk, teller or book-keeper of a corporation formed under or subject to the banking law shall act as proxy for any stockholder at any meeting of such corporation. Every proxy must be executed in writing by the member himself, or by his duly authorized attorney.

No proxy hereafter made shall be valid after the expiration of eleven months from the date of its execution unless the member executing it shall have specified therein the length of time it is to continue in force. Every proxy shall be revocable at the pleasure of the person executing it; but a corporation having no capital stock may prescribe in its by-laws the persons who may act as proxies for members, and the length of time for which proxies may be executed." No director or trustee of a corporation can vote at a meeting of the board of directors by proxy. *Craig Med. Co. v. Bank*, 59 Hun, 561.

Q. A, the bookkeeper of the X Bank, having a properly executed proxy of B, one of the stockholders of said bank, attempts to vote at a meeting of the corporation, when a question arises as to the validity of the proxy and whether A can vote upon it. State whether or not the proxy is valid.

A. The proxy is not valid, being expressly prohibited by the General Corp. Law, sec. 26, *supra*.

Q. The by-laws of the X Corporation provide that an election of directors shall be held once a year. The board elected July, 1913, is sued for failing to file an annual report in May, 1915, no election having been held in 1914. The directors defend on the ground that their terms of office ended July, 1914, and that they are not liable for subsequent acts of the corporation. Is the defense good?

A. The defense is not good. Section 28 of the General Corp. Law, provides as follows: "If the directors shall not be elected on the day designated in the by-laws or by law, the corporation shall not for that reason be dissolved; but every director shall continue to hold his office and discharge his duties until his successor has been elected." Therefore in this case, the directors continuing as such, are liable for the failure to file an annual report. *Beardsley v. Johnston*, 121 N. Y. 224.

Q. The by-laws of a corporation provide that a majority of the board of directors, at a meeting duly assembled, shall consti-

tute a quorum for the transaction of its business. The board of directors consisted of five members. At a meeting duly called, three directors were present; two voted to sell a piece of the corporation's real estate to your client, and one voted against it. Is the title good? Reasons.

A. Title is good according to the provisions of sec. 34 of the General Corp. Law, which is as follows: "The affairs of every corporation shall be managed by its board of directors, at least one of whom shall be a resident of this state. Unless otherwise provided a majority of the board of directors of a corporation at a meeting duly assembled shall be necessary to constitute a quorum for the transaction of business and the act of a majority of the directors present at a meeting at which a quorum is present shall be the act of the board of directors. The members of a corporation may in by-laws fix the number of directors necessary to constitute a quorum at a number less than a majority of the board, but at least equal to one-third of its number. Subject to the by-laws, if any, adopted by members of a corporation, the directors may make necessary by-laws of the corporation."

Q. The X Corporation was dissolved, and thereafter the directors of said corporation sued A to recover a debt due by him to the corporation. A demurs on the ground that the directors have no legal capacity to sue. Judgment for whom and why?

A. Judgment for the directors. Section 35 of the General Corp. Law covers this point, and is as follows: "Upon the dissolution of any corporation, its directors, unless other persons shall be appointed by the legislature, or by some court of competent jurisdiction, shall be the trustees of its creditors, stockholders or members, and shall have full power to settle its affairs, collect and pay outstanding debts, and divide among the persons entitled thereto the money and other property remaining after payment of debts and necessary expenses. Such trustees shall have authority to sue for and recover the debts and prop-

erty of the corporation, by their name as such trustees, and shall jointly and severally be personally liable to its creditors, stockholders or members, to the extent of its property and effects that shall come into their hands."

Q. The X Corporation is incorporated in 1912 to manufacture cigars. It does not begin business until 1915. A question arises as to the existence of the corporation. Give your opinion as to whether or not the X Corporation has a legal existence.

A. This question is fully answered by section 36 of the General Corp. Law, which is as follows: "If any corporation, except a railroad, turnpike, plankroad or bridge corporation, shall not organize and commence the transaction of its business or undertake the discharge of its corporate duties within two years from the date of its incorporation, its corporate powers shall cease." See *People v. Ballard*, 134 N. Y. 269; *People ex rel. Hearst v. Ramapo Water Co.*, 51 App. Div. 145.

Q. The X Corporation finding that its term of existence is about to expire, comes to you and asks how and in what manner its term of existence may be extended. What would be your advice?

A. Section 37 of the General Corp. Law covers this point, and is as follows: "Any domestic corporation at any time before the expiration thereof, may extend the term of its existence beyond the time specified in its original certificate of incorporation, or by-law, or in any certificate of extension of corporate existence, by the consent of the stockholders owning two-thirds in amount of its capital stock, or if not a stock corporation, by the consent of two-thirds of its members, which consent shall be given either in writing or by a vote at a special meeting of the stockholders called for that purpose, upon the same notice as that required for the annual meetings of the corporation; and a certificate under the seal of the corporation that such consent was given by the stockholders in writing, or that it was given by a vote at a meeting as aforesaid, shall be subscribed and acknowledged by the president or vice president,

and by the secretary or an assistant secretary of the corporation, and shall be filed in the office of the secretary of state, and shall be by him duly recorded and indexed in a book specially provided therefor, and a certified copy of such certificate, with the certificate of the secretary of state of such filing and record, or a duplicate original of such certificate, shall be filed and similarly recorded and indexed in the office of the clerk of the county wherein the corporation has its principal place of business, and shall be noted in the margin of the record of the original certificates of such corporation, if any, in such offices, and thereafter the term of the existence of such corporation shall be extended as designated in such certificates. The certificate of incorporation of any corporation whose duration is limited by such certificate or by-law, may require that the consent of the stockholders owning to a greater percentage than two-thirds of the stock, if a stock corporation, or of more than two-thirds of the members, if a nonstock corporation, shall be requisite to effect an extension of corporate existence as authorized by this section."

Q. Testator gives to A the income of 100 shares of stock, and after his (A's) death the shares to go to B. After testator's death, the corporation issues 25 shares of new stock to eat up the surplus profits. To whom does the new stock belong, A or B?

A. The shares of stock belong to A. "When a stock dividend declared by a corporation, and allotted to shares of its original capital stock, belonging to a testamentary trust estate, constitutes as a matter of fact a distribution of accumulated earnings or profits, it represents income, and belongs to the life tenant of the trust estate, as between him and the remainderman. The courts are not concluded from treating such earnings as income, by the form of distribution, as in shares of stock." *McLouth v. Hunt*, 154 N. Y. 179. There is no substantial distinction as to the ownership between stock and cash dividends. The law is well settled that a cash dividend is income and goes to the life tenant. *Lowry v. F. L. &*

T. Co., 172 N. Y. 137; *Robertson v. Brulatone*, 188 N. Y. 301; *Matter of Harteau*, 204 N. Y. 292.

Q. A was the owner of stock in the X Corporation. He sells it to B. B makes application to the officers of the corporation to issue to him a certificate. They refuse on the ground that the corporation has a large claim against A. Rights of B and why? Answer fully.

A. The corporation can only refuse a transfer of the stock when sec. 51 of the Stock Corp. Law is written or printed upon the certificate of stock. This section is as follows: "If a stockholder shall be indebted to the corporation, the directors may refuse to consent to a transfer of his stock until such indebtedness is paid, provided that a copy of this section is written or printed upon the certificate of stock." Irrespective of the question of indebtedness, it is well settled that an equitable action will lie to compel a transfer on its books by a corporation of shares of its capital stock to the owner of the same. *Cushman v. Thayer Mfg. Co.*, 76 N. Y. 365. In that case the court said: "It is easy to see that the party may have become the owner or purchaser of stock in a corporation, which he desires to hold as a permanent investment, which may be at the time of but little value, in fact without any market value whatever, and its real worth may consist in the prospective rise which the owner has reason to anticipate will follow from facts within his knowledge. To say that the holder shall not be entitled to the stock, because the corporation, without any just reason, refuses to transfer it, and that he shall be left to pursue the remedy of an action for damages in which he can recover only a nominal amount, would establish a rule which must work great injustice in many cases, and confer a power to corporate bodies which has no sanction in the law."

Q. A, having recovered judgment against the X Corporation, wishes to bring suit against certain stockholders thereof and desires to know their names. He applies to the corporation for leave to inspect its books, but the corporation refuses his request. A comes to you for advice. What are his rights?

A. He can compel the corporation to allow him to inspect its books, for sec. 32 of the Stock Corp. Law provides as follows: "Every stock corporation shall keep at its office correct books of account of all its business and transactions, and a book to be known as the stock book, containing the names alphabetically arranged, of all persons who are stockholders of the corporation, showing their places of residence, the number of shares of stock held by them respectively, the time when they respectively became the owners thereof, and the amount paid thereon. The stock book of every such corporation shall be open daily, during at least three business hours, for the inspection of its stockholders and judgment creditors, who may make extracts therefrom. No transfer of stock shall be valid as against the corporation, its stockholders and creditors for any purpose except to render the transferee liable for the debts of the corporation to the extent provided for in this chapter, until it shall have been entered in such book as required by this section, by an entry showing from and to whom transferred. The stock book of every such corporation and the books of account of every bank shall be presumptive evidence of the facts therein so stated in favor of the plaintiff, in any action or proceeding against such corporation or any of its officers, directors or stockholders. Every corporation that shall neglect or refuse to keep or cause to be kept such books, or to keep any book open for inspection as herein required, shall forfeit to the people the sum of fifty dollars for every day it shall so neglect or refuse. If any officer or agent of any such corporation shall willfully neglect or refuse to make any proper entry in such book or books, or shall neglect or refuse to exhibit the same, or allow them to be inspected and extracts taken therefrom as provided in this section, the corporation and such officer or agent shall each forfeit and pay to the party injured a penalty of fifty dollars for every such neglect or refusal, and all damages resulting to him therefrom." "A stockholder has the right to inspect the stock book of the corporation during business hours with his attorney or other person having knowledge of such affairs. Mandamus will lie to compel the inspection of books." *People ex rel. Clason v. Nassau Ferry Co.*,

86 Hun, 128. See also *Matter of Steinway*, 159 N. Y. 250; *People ex rel. Callanan v. R. R. Co.*, 106 App. Div. 349; *People ex rel. Fennelly v. Alm. Copper Co. & Nat. City Bank*, 110 App. Div. 892, *aff'd* in 184 N. Y. 578; *Henry v. Babcock & Wilcox Co.*, 196 N. Y. 302.

Q. The directors of the X Corporation fail to file an annual report as prescribed by law. B, a creditor, sues one of the directors upon a debt which accrued subsequent to the failure of the directors to file their report. The director demurs on the ground that B must first sue the corporation, and furthermore that he must join the other directors as defendants with him. Judgment for whom and why?

A. Judgment for B. "Under sec. 30 of the Stock Corp. Law of 1892 (now Consolidated Laws, chap. 59, sec. 34) compelling every corporation, except moneyed or railroad corporations to furnish a complete and accurate statement of its financial condition and responsibility at the commencement of each year, an action in case of the violation of this section can be maintained against any one director thereof, and the recovery of a judgment against the corporation and the issue of an execution thereon and its return unsatisfied, are not conditions precedent to the bringing of such actions." *Milsum Co. v. Baker*, 16 App. Div. 581.

Q. A sells 100 shares of stock to B. B demands that the corporation place his name upon the books as a shareholder, which is refused by the corporation. Has the corporation a right to refuse to recognize the demands of B? If so, why so? If not, why not? Give reasons.

A. The corporation has no right to refuse a transfer on the books of the corporation, unless the stock was not fully paid up. Section 50 of the Stock Corp. Law provides in part as follows: "No share shall be transferable until all previous calls thereon shall have been fully paid in." If the stock has been fully paid and the corporation refuses a transfer on the books of the corporation, an action to compel them to do so will lie. *Cush-*

man v. Thayer Manufacturing Co., 76 N. Y. 365. "It was expressly held in *People ex rel. Krohn v. Miller*, 39 Hun, 557, aff'd 114 N. Y. 636, and in *Matter of Shipley*, 16 Johns. 484, and in *People ex rel. Jenkins v. Coal Co.*, 1 Abb. Pr. 128, that mandamus would not lie to compel the transfer of stock upon the books of a corporation, and our attention has not been called nor have we been able to find any authoritative decision in this state to the contrary." Houghton, J., in *People ex rel. Rottenberg v. Utah Gold & Copper Co.*, 135 App. Div. 419. In such case, the proper remedy is by action.

Q. A sells certain property to the X Corporation for \$5,000 in shares, the property being necessary for the corporate purposes. Subsequently the corporation issues a call on said stock claiming that the value of the property was \$3,500. A refuses to pay and consults you. What are his rights?

A. He can hold the stock as fully paid stock, and need not pay any calls thereon, according to sec. 55 of the Stock Corp. Law, which is as follows: "No corporation shall issue either stock or bonds except for money, labor done or property actually received for the use and lawful purposes of such corporation. Any corporation may purchase any property authorized by its certificate of incorporation, or necessary for the use and lawful purposes of such corporation, and may issue stock to the amount of the value thereof in payment therefor, and the stock so issued shall be full paid stock and not liable to any further call, neither shall the holder thereof be liable for any further payment under any of the provisions of this chapter; and in the absence of fraud in the transaction the judgment of the directors as to the value of the property purchased shall be conclusive; and in all statements and reports of the corporation, by law required to be published or filed, this stock shall not be stated or reported as issued for cash paid to the corporation, but shall be reported as issued for property purchased."

Q. A corporation engaged in the manufacture of clothing becomes insolvent, and executes a chattel mortgage on its

machines as collateral security for its commercial paper in order to give preference to the holders thereof. Is this mortgage valid as against the other creditors?

A. The mortgage is void as against the other creditors, as preferences by an insolvent corporation are not permitted by sec. 66 of the Stock Corp. Law, which is as follows: "No corporation which shall have refused to pay any of its notes or other obligations, when due, in lawful money of the United States, nor any of its officers or directors, shall transfer any of its property to any of its officers, directors or stockholders, directly or indirectly, for the payment of any debt, or upon any other consideration than the full value of the property paid in cash. No conveyance, assignment or transfer of any property of any such corporation by it or by any officer, director or stockholder thereof, nor any payment made, judgment suffered, lien created or security given by it or by any officer, director or stockholder when the corporation is insolvent or its insolvency is imminent, with the intent of giving a preference to any particular creditor over other creditors of the corporation, shall be valid, except that laborers' wages for services shall be preferred claims and be entitled to payment before any other creditors out of the corporation assets in excess of valid prior liens or incumbrances. No corporation formed under or subject to the banking, insurance or railroad law shall make any assignment in contemplation of insolvency. Every person receiving by means of any such prohibited act or deed any property of the corporation shall be bound to account therefor to its creditors or stockholders or other trustees. No stockholder of any such corporation shall make any assignment or transfer of his stock therein to any person in contemplation of its insolvency. Every transfer or assignment or other act done in violation of the provisions of this section shall be void."

Q. The X Corporation becomes insolvent and makes an assignment in which two of its directors are preferred. Two of the creditors put in their claims before the referee, and

then move before the referee to reject the preferred claims, on the ground of the invalidity of the preference. What are the rights of the parties, and should the motion have been made before the referee?

A. The preference is void, and the referee has power to pass on its invalidity, it being a violation of sec. 66 of the Stock Corp. Law, *supra*. See *Berwind Co. v. Ewart*, 11 Misc. 490, *aff'd* 90 Hun, 60.

Q. An insolvent manufacturing corporation owes a bona fide debt to A, one of the directors, to which it has no defense. A sues and recovers judgment by default, levies upon the property of the corporation and sells it to pay his debt. A receiver is appointed and finds no tangible assets of the corporation. What are the rights of the receiver in the premises, if any, and how would you enforce them?

A. The receiver can have the judgment vacated. In *Kingsley v. Bank*, 31 Hun, 329, it was held: "That as A was a stockholder in, and a director of the company, it was his duty to do all in his power to carry out the object and purpose of the law, and secure equality of payment among the creditors of the company; that the entry of judgment by him in his own favor against the company, while it was insolvent, and the levy made and the execution issued thereon was a violation of such duty, that the judgment should be vacated and annulled on the receiver's application." See also *Cole v. M. I. Co.*, 133 N. Y. 164; *Munson v. Iron Works*, 37 App. Div. 207.

(NOTE.) In *Throop v. Hatch Co.*, 125 N. Y. 530, it was said by the court: "That sec. 48 (now sec. 66) prohibits the acquisition by a director of an insolvent corporation who is also a creditor, through process of attachment, of a preferential lien on the corporate assets; and this although the writ was issued in hostility to, and not in collusion with the corporation."

Q. A, the director of the X Corporation, and certain creditors thereof, agree that the creditors should sue the corporation by service upon A, and that A, the director, would not report the service to the officers and other directors, and that the cred-

itors might take judgment. This was done as agreed. Is there any valid objection to the judgment?

A. There is no objection to the judgment. The case of *Varnum v. Hart*, 119 N. Y. 101, is exactly in point; it was there held: "That the statute was not violated, as neither creditor nor director was under any statutory restraint; and that there was no violation of the statute by a failure of the director to disclose the fact of the service of the papers upon him, whereby a debt really existing and honestly due obtained a preference. Neither the director who was served nor the other officers if they had known of the service of the papers were bound to interpose a defense; and whatever was done or authorized to be done or omitted, the fact remains that there was no assignment or transfer of the property, and hence no violation of the statute. An insolvent corporation is not obliged to defend any suit brought against it for a valid debt, against which there is no valid legal defense, for the sole purpose of defeating a preference; it may suffer default, and thus allow a preference." This case was cited with approval in *French v. Andrews*, 145 N. Y. 445, and in *Lopez v. Campbell*, 163 N. Y. 340. In this last case, it was held that the rule laid down in *Varnum v. Hart*, supra, has not been changed, even though sec. 48 (now sec. 66) has been amended.

Q. A, the president of the X Corporation, knowing that it is insolvent, sends a message from his wife to her attorney directing him to bring suit to obtain judgment on a past due promissory note of \$2,000, given by the corporation to her for value. The attorney did as requested and recovered judgment by default. A question arises as to the validity of this judgment. What do you say?

A. The judgment is valid, as it was not procured in violation of sec. 66 of the Stock Corp. Law. "A judgment recovered against an insolvent corporation is not void under the statute unless recovered by the active procurement of an officer of such corporation. The fact that the president conveyed a

message from his wife to the attorney for the corporation who was not an officer thereof, asking him to commence a suit in her name against the company, does not establish a violation of the statute." *Dickson v. Mayer*, 35 State Rep. 482.

(NOTE.) "If the corporation or its officers performed any act by which a creditor was enabled to obtain a judgment to which he was not entitled, or omitted to interpose any legal defense it had to its claim, and thus suffered an improper judgment against the corporation, the judgment so suffered would be invalid. But where a creditor has a just claim to which the corporation has no defense, and he adopts the ordinary process and procedure of the court to enforce it, which results in a judgment by default, it cannot be properly held to be within the condemnation of the statute." *Martin, J.*, in *Lopez v. Campbell*, 163 N. Y. 346. See also *Jefferson Bank v. Townley*, 159 N. Y. 490.

Q. The X Corporation issues full paid up stock to A. In fact A has only paid 20% of the par value of said stock. The corporation becomes insolvent and a receiver is appointed. The receiver calls upon A to pay the remaining 80% of his stock. A refuses, and the receiver brings an action to compel him to do so. Can the action be maintained?

A. Yes. Section 56 of the Stock Corp. Law provides in part as follows: "Every holder of capital stock not fully paid, in any stock corporation shall be personally liable to its creditors to an amount equal to the amount unpaid on the stock held by him, for the debts of the corporation contracted while such stock was held by him." *Thompson v. Knight*, 74 App. Div. 316; *Rathbone v. Ayer*, 84 App. Div. 186; *Lang v. Lutz*, 180 N. Y. 254. *These cases hold the action cannot be maintained.*

Q. A does certain painting for the X Corporation, which afterwards becomes insolvent. A, not having been paid for his work, sues B, one of the stockholders. Can the action be maintained? If you had been A's attorney, what would you have done?

A. The action cannot be maintained without first exhausting the remedies against the corporation, and otherwise complying with sec. 57 of the Stock Corp. Law, which is as follows:

“The stockholders of every stock corporation shall jointly and severally be personally liable for all debts due and owing to any of its laborers, servants or employees other than contractors, for services performed by them for such corporation. Before such laborer, servant or employee shall charge such stockholder for such services, he shall give him notice in writing within thirty days after the termination of such services, that he intends to hold him liable, and shall commence an action therefor within thirty days after the return of an execution unsatisfied against the corporation upon a judgment recovered against it for services.” Section 59 of the Stock Corp. Law provides as follows: “No action shall be brought against a stockholder for a debt of the corporation until judgment therefor has been recovered against the corporation, and an execution thereon has been returned unsatisfied in whole or in part, and the amount due on such execution shall be the amount recoverable, with costs against the stockholder. No stockholder shall be personally liable for any debt of the corporation not payable within two years from the time it is contracted, nor unless an action for its collection shall be brought against the corporation within two years after the debt becomes due; and no action shall be brought against a stockholder after he shall have ceased to be a stockholder, for any debt of the corporation, unless brought within two years from the time he shall have ceased to be a stockholder.” See *Bank v. Dillingham*, 147 N. Y. 603; *Rubber Co. v. Agnew*, 194 N. Y. 165.

Q. A, an officer of a corporation, lends to the corporation \$10,000, and takes a bond of the corporation as security. The corporation at that time was solvent. Six months later, the corporation becomes insolvent and a receiver is appointed. A attempts to prove his claim on the bond before the receiver. The claim is disallowed. A takes legal steps to enforce his claim with the other creditors. Can he succeed?

A. Yes. A had a right to secure himself for the advances made, and in the absence of proof of fraud, or of an improper and undue advantage taken, or the insolvency of the company

at the time he took the bond, to prove them for the full amount, and to share in the distribution up to the amount of his claim. There is nothing inconsistent with his position as officer to loan money to the corporation, and to secure himself for the loan made, therefore he has equal rights with the other creditors. *Duncomb v. R. R.*, 88 N. Y. 1.

(NOTE.) "A transaction whereby directors, in good faith and in the belief that the corporation was solvent, made a loan to it and accepted an assignment of securities from it as collateral, pursuant to a plan to relieve it of its financial difficulties, is not contrary to public policy and is valid, although the corporation was, in fact, insolvent at the time the loan was made. When the validity, as against other creditors, of a transaction between a corporation and its directors, depends upon their belief in its solvency, their actual knowledge of its condition, as distinguished from that imputed to them by reason of their relation to it as directors, is of determining importance." *Converse v. Sharp*, 161 N. Y. 571.

Q. A purchased certain real estate of the X Corporation which at the time was insolvent. He paid full value therefor, and had no knowledge of the financial condition of the said corporation. A receiver is appointed and he brings action against A to recover the real estate. Can he recover?

A. No. A was a bona fide purchaser for value. "The assets of a corporation are a trust fund for the payment of its debts upon which the creditors have an equitable lien, both as against the stockholders and all transferees, except those purchasing in good faith and for value." *Cole v. M. I. Co.*, 133 N. Y. 164. See also *Ward v. City Trust Co.*, 112 N. Y. 73.

Q. State what is necessary for a foreign corporation to do business in this state.

A. A certificate from the secretary of state must be obtained showing that it has complied with all the requirements of secs. 15 and 16 of the General Corp. Law. A license fee as provided for in Tax Law, sec. 181 (Consolidated Laws, chap. 60), must be paid.

Q. There is a defect in the certificate of incorporation of the X Corporation. How would you correct said defect?

A. Apply to the supreme court upon notice to the attorney-general for an order amending the certificate of incorporation. This is provided for in sec. 7 of the General Corp. Law.

Q. A was the owner of twenty-five shares of the capital stock of the X Corporation, for which he held a certificate. The certificate was destroyed by fire, and A made application to the corporation to issue to him a new certificate, which was refused. State what proceedings you would take, if any, to secure A a new certificate.

A. Apply to the supreme court upon notice to the corporation for an order compelling the corporation to issue a new certificate. This is provided for by secs. 67 and 68 of the Stock Corp. Law.

Q. At a meeting of the X Corporation, the stockholders owning 55% of the capital stock vote to purchase certain machinery from one of the stockholders; the said machinery being necessary for the business of the company. A, one of the minority stockholders, comes to you and asks you to bring proceedings to restrain the purchase of the machinery. Can you do so?

A. No. In the absence of fraud, a minority shareholder cannot object to the action of the majority. *Gamble v. I. C. W. Co.*, 123 N. Y. 91; *Farmers' L. & T. Co. v. N. Y. C. N. R. Co.*, 150 N. Y. 410. "As a general rule courts have nothing to do with the internal management of business corporations. Whatever may lawfully be done by the directors or stockholders, acting through majorities prescribed by law, must of necessity be submitted to by the minority, for corporations can be conducted upon no other basis. All questions within the scope of the corporate powers which relate to the policy of administration, to the expediency of proposed measures or to the consideration of contracts, provided it is not so grossly inadequate as to be evidence of fraud, are beyond the province of the courts. The minority directors or stockholders cannot come into court upon allegations of a want of judgment or

lack of efficiency on the part of the majority and change the course of administration. Corporate elections furnish the only remedy for internal dissensions, as the majority must rule so long as it keeps within the powers conferred by the charter." Vann, J., in *Flynn v. Brooklyn City R. R.*, 158 N. Y. 507. See also *Schwab v. Potter Co.*, 194 N. Y. 415.

Q. The president of the X Corporation is voted an extra compensation by the directors of said corporation for services performed. A, a stockholder, objecting, comes to you for advice. What are his rights, if any?

A. An officer of a corporation, in the absence of any agreement that as such he shall receive a salary for his services, is not entitled to any compensation, for acts done in the legitimate discharge of the duties of his office, and any money so paid to him by the directors, the latter become liable therefor. *Barril v. Callender Co.*, 50 Hun, 257; *Mather v. Eureka Mower Co.*, 118 N. Y. 629.

Q. A was the president and director of the Y Stock Corporation. There were several litigations pending against the company, and A, who was also a lawyer, was engaged to defend them by the board of directors. There was no resolution of the board of directors to employ or compensate A for his services as attorney, nor did the by-laws of the company entitle him to a salary for his services. A makes claim against the company for \$2,000, the reasonable value for his services, which the company refuses to pay. Can A enforce his claim, and why?

A. Yes. "The president and director of a corporation who renders services thereto outside of his official duties, upon an employment of the directors upon a promise of compensation, is entitled to recover the value of such services and the expenses incurred during their rendition, although he is not entitled by the by-laws to any salary for his official services and there is no express resolution of the board of directors containing an agreement to employ and compensate him."

Bagley v. R. R. Co., 165 N. Y. 179. See also F. L. & T. Co. v. H. R. R. Co., 152 N. Y. 251.

Q. A, the treasurer of the X Corporation, paid his individual debt to B in the sum of \$5,000 with a check of the corporation. B deposited the check which was paid in due course. A at the time of the giving of the check was a defaulter and had no authority to use or give checks of the corporation for this purpose. B took the check in good faith. The company, discovering the facts, demands the amount of the check from B, and upon B's refusal to pay, brings action. Judgment for whom and why?

A. Judgment for the corporation. "The payee of corporate checks who receives them from the treasurer of the corporation in payment of a debt not owed by the corporation, but in payment of one which he has treated as the treasurer's individual debt, when the latter has no actual or apparent authority to issue such checks either in payment of his own debt or that of a third person, is chargeable with notice of his incapacity to issue them, and is bound to inquire as to the real situation, and where he accepts the checks without question and draws the money thereon, he is liable in an action by the corporation to recover the amount paid as money received by him to its use." *Rochester & C. T. R. Co. v. Paviour*, 164 N. Y. 281. So also *Hathaway v. County of Delaware*, 185 N. Y. 368.

Q. The directors of the X Corporation duly authorized the officers thereof to execute its promissory note for a loan to the corporation, which was accordingly done. The corporation agreed to return the amount of the loan with interest at the rate of 10%. In a suit upon the note against the corporation, it sets up the defense of usury. Is this defense good? Give reasons.

A. No. A corporation cannot set up the defense of usury. "An accommodation indorser of a promissory note made by a manufacturing corporation, and negotiated for its benefit, cannot defend the same on the ground of usury. The act of 1850 (ch. 172, Laws of 1850) prohibiting a corporation from

interposing the defense of usury, includes the collateral contracts of individuals as sureties, guarantors or indorsers for the corporation." *Rosa v. Butterfield*, 33 N. Y. 664; *Stewart v. Bramhall*, 74 N. Y. 85. The General Business Law, sec. 374, is a re-enactment of chap. 172, Laws of 1850, and provides that no corporation shall hereafter interpose the defense of usury in any action. See also *Weinreb v. Coleman Stable Co.*, 70 Misc. 535, where it was held that: "Usury is not a defense to an action against the accommodation indorser of a note made by a corporation and negotiated for its benefit."

Q. How would you incorporate a stock corporation? State the requirements.

A. This is provided for in sec. 2 of the Business Corp. Law (Consolidated Laws, chap. 4). Three or more persons may form a corporation by signing, acknowledging and filing a certificate which shall contain: 1. The name of the proposed corporation. 2. The purpose or purposes for which it is formed. 3. The amount of the capital stock, and if any portion be preferred stock, the preferences thereof. 4. The number of shares of which the capital stock shall consist, each of which shall not be less than five nor more than one hundred dollars, and the amount of capital not less than five hundred dollars, with which said corporation will commence business. 5. The city, village or town in which its principal business office is to be located. If it is to be located in the City of New York, the borough therein in which it is to be located. 6. Its duration. 7. The number of its directors, not less than three. 8. The names and post-office addresses of the directors for the first year. 9. The names and post-office addresses of the subscribers to the certificate, and a statement of the number of shares of stock of which each agrees to take in the corporation.

A fee for filing must be paid to the secretary of state, and an organization tax must be paid to the state treasurer as provided for in sec. 180 of the Tax Law (Consolidated Laws, chap. 60). The tax is one-twentieth of one per cent.

CHAPTER VIII

Criminal Law

Q. State the legal presumption as to the responsibility of an infant for his crimes.

A. Section 816 of the Penal Law provides as follows: "A child under the age of seven years is not capable of committing crime." Section 817 further provides in part as follows: "A child of the age of seven years, and under the age of twelve, is presumed to be incapable of crime, but the presumption may be removed by proof that he had sufficient capacity to understand the act or neglect charged against him and to know its wrongfulness." Otherwise infants are liable for their crimes, the same as adults.

Q. A was indicted for murder in the first degree; he admitted the killing, but offered evidence to show that when he committed the deed, he was in the state of voluntary intoxication, and offered no other evidence. The evidence is objected to as incompetent and irrelevant. Was the evidence admissible? If so, for what purpose, and what is the general rule? State whether or not voluntary intoxication is a defense to a crime or not.

A. Voluntary intoxication is no defense to a crime, but is admissible in evidence to show intent. Section 1220 of the Penal Law covers this question, and is as follows: "No act committed by a person while in a state of voluntary intoxication, shall be deemed less criminal by reason of his having been in such condition. But whenever the actual existence of any particular purpose, motive or intent is a necessary element to constitute a particular species or degree of crime, the jury may take into consideration the fact that the accused was intoxicated at the time, in determining the purpose, motive or intent

with which he committed the act." See *People v. Cory*, 148 N. Y. 476; *People v. Krist*, 168 N. Y. 19.

Q. A holds B, while C, A's wife, takes B's pocketbook containing \$2,000 from him (B). A and C are subsequently indicted for robbery. At the trial, the attorney for the prisoners asks the court to discharge the wife on the ground that the act was committed in the presence of her husband, and therefore she was not responsible. What should the ruling of the court be?

A. The motion should be denied, as the wife is liable, she having assisted in the commission of the crime. This is provided for in sec. 1092 of the Penal Law, which is as follows: "It is not a defense to a married woman charged with crime, that the alleged criminal act was committed by her in the presence of her husband." See *Seiler v. People*, 77 N. Y. 411; *Goldstein v. People*, 82 N. Y. 231; *People v. Ryland*, 97 N. Y. 126.

Q. A is given a \$20 bill by his employer with instructions to go to the market and purchase certain goods. On the way he is met by B who induces him to misappropriate the money. Of what crime, if any, is B guilty?

A. B is guilty of petit larceny, as the amount misappropriated is less than \$50. As B aided and abetted, he is deemed a principal within the provisions of sec. 2 of the Penal Law, which in part is as follows: "A person concerned in the commission of a crime, whether he directly commits the act constituting the offense or aids and abets in its commission and whether present or absent, and a person who directly or indirectly counsels, commands, induces or procures another to commit a crime, is a principal." This section abolishes the common-law distinction between accessories before and after the fact, the former being included in the definition of a principal. *People v. Bliven*, 112 N. Y. 82. Accessory, corresponding to accessory after the fact, is defined in sec. 2 of the Penal Law as follows: "A person who, after the commission of a felony, harbors, conceals, or aids the offender, with intent that he may avoid

or escape from arrest, trial, conviction, or punishment, having knowledge or reasonable ground to believe that such offender is liable to arrest, has been arrested, is indicted or convicted, or has committed a felony, is an accessory to the felony." In this case, even if B were not held to come within the statutory definition of a principal, he would yet be liable, as petit larceny is a misdemeanor (sec. 1299, Penal Law), and all are considered as principals in misdemeanors, according to sec. 27 of the Penal Law, which is as follows: "A person who commits or participates in an act which would make him an accessory if the crime committed were a felony, is a principal and may be indicted and punished as such, if the crime be a misdemeanor."

Q. A, who is desirous of having B murdered, induces B's servant to administer poison to him. A did not purchase the poison nor was he present when the servant administered the poison to B which caused his death. Of what crime, if any, is A guilty?

A. A is guilty of murder. One who induces another to commit a crime although not present is deemed a principal, according to sec. 2 of the Penal Law, *supra*. *People v. Patrick*, 182 N. Y. 142.

Q. A and B broke into the dwelling house of C for the purpose of robbing the same. While A was engaged in robbing and B in watching, they were discovered and a struggle ensued in which several shots were fired by both A and B; one of the shots killed C. Upon the trial of B for murder his attorney asks for an acquittal on the ground that it cannot be shown who fired the fatal shot. What should be the decision of the court?

A. The motion should be denied. "The defendant and his confederate were conspirators engaged in the commission of a felony, they were engaged in a common crime and the homicide was within the common purpose. Both were principals throughout, and what one did both did in the eye of the law; if either

fired the shot that resulted fatally, both are equally guilty of murder." *People v. Giro*, 197 N. Y. 152.

Q. A was walking down Broadway. B puts his hand in A's pocket, intending to steal what was in the pocket. At the trial, it appears that there was nothing in the pocket. Is B guilty of a crime, and if so, what?

A. B is guilty of attempting to commit the crime of grand larceny. "The language of the Statute seems to us too plain to admit of doubt and was intended to reach cases where an intent to commit a crime and an effort to perpetrate it although ineffectual, coexisted; whenever the *animo furandi* exists, followed by acts apparently affording a prospect of success and tending to render the commission of the crime effectual, the accused brings himself within the letter and intent of the Statute. To constitute the crime charged there must be a person from whom the property may be taken; an intent to take it against the will of the owner, and some act performed tending to accomplish it, and when these things concur, the crime has, we think, been committed whether property could, in fact, have been stolen or not. In such cases the accused has done the utmost to effect the commission of the crime, but fails to accomplish it for some cause not previously apparent to him." *Ruger*, Ch. J., in *People v. Moran*, 123 N. Y. 254. Section 2 of the Penal Law provides as follows: "An act done with intent to commit a crime, and tending but failing to effect its commission, is an attempt to commit that crime."

Q. A with intent to shoot B aimed a loaded pistol at him. A was within shooting distance of B, but before A could do anything further, he was disarmed. Of what crime, if any, was A guilty?

A. A was guilty of assault in the second degree, because he pointed a loaded pistol at B with intent to do bodily harm, and the crime was completed by the act of pointing the weapon. Section 242 of the Penal Law. *People v. Conner*, 53 Hun, 353; *People v. Ryan*, 55 Hun, 214.

(NOTE.) An approach to commit an assault, although not near enough to enable it to be committed, constitutes an attempt to commit the assault. *People v. McConnell*, 60 Hun, 113.

Q. A's goods were stolen and thereafter restored to him. B, believing that the goods were in the hands of the thief, attempts to purchase them of C, the agent of A, after the goods had been restored to A. Of what crime, if any, is B guilty?

A. B is guilty of no crime. "The proof clearly showed, that the goods which defendant attempted to purchase had lost their character as stolen goods at the time when they were offered to the defendant and when he sought to buy them. In fact the property had been restored to the owners and was wholly within their control and was offered to the defendant by their authority and through their agency. He simply made an effort to purchase certain specific pieces of cloth. He believed the cloth to be stolen property, but it was not such in fact. The purchase therefore, if it had been completely effected, could not constitute the crime of receiving stolen property, knowing it to be stolen, since there could be no such thing as knowledge on the part of the defendant of a non-existent fact, although there might be a belief on his part that the fact existed. As Mr. Bishop well says, it is a mere truism that there can be no receiving of stolen goods which have not been stolen. (2 Bishop's New Crim. Law, sec. 1140.) It is equally difficult to perceive how there can be an attempt to receive stolen goods, knowing them to have been stolen, when they have not been stolen in fact." *People v. Jaffe*, 185 N. Y. 497.

Q. A in the night time passes through an alley in the rear of the store of B, with the intention of robbing the same. He reconnoiters the premises. He has with him at the time burglar tools, which he does not consider strong enough. He leaves them near the store and goes to a neighboring blacksmith's shop and obtains a crowbar and returns. On his return, a detective who has been watching him, arrests him before he commences to act. Is A guilty of any crime?

A. A is guilty of attempting to commit the crime of burglary. "The act of getting the proper instruments, whether from the blacksmith's shop or elsewhere, was as much an act to enable him to commit the offense, as it would have been if he had taken the crowbar for the purpose, which he had happened to find beside the door of the store. In order to constitute an attempt to commit a crime, there must be more than a mere design, there must have been some ineffectual act towards its accomplishment." *People v. Lawton*, 56 Barb. 126.

Q. A takes poison intending to end his life. He is taken to a hospital where he recovers. Is he guilty of a crime, and if so, what? Is suicide a crime?

A. A is guilty of the crime of attempting to commit suicide. Suicide is not a crime. *Darrow v. Soc., etc.*, 116 N. Y. 537. Section 2301 of the Penal Law provides as follows: "Although suicide is deemed a great public wrong, yet from the impossibility of reaching the successful perpetrator, no forfeiture is imposed." But an attempt to commit suicide is a felony, according to secs. 2302 and 2303 of the Penal Law, which are as follows: "A person who, with intent to take his own life, commits upon himself an act dangerous to human life, or which if committed upon or towards another person and followed by death as a consequence, would render the perpetrator chargeable with homicide, is guilty of attempting suicide." Section 2303 says: "Every person guilty of attempting suicide is guilty of a felony, punishable by imprisonment in a state prison not exceeding two years, or by a fine not exceeding one thousand dollars, or both."

(NOTE.) Section 2304 of the Penal Law says that: "A person who willfully, in any manner, advises, encourages, abets, or assists another person in taking the latter's life, is guilty of manslaughter in the first degree." Section 2305 says that: "A person who willfully, in any manner, encourages, advises, assists or abets another person in attempting to take the latter's life, is guilty of a felony." Section 2306 says that: "It is not a defense to a prosecution under either of the last two sections, that the person who took, or attempted to take, his own life, was not a person deemed capable of committing crime."

Q. A is charged with the murder of B. A dismembered body is found, but the district attorney cannot prove by direct evidence that it is the body of B; there is sufficient evidence, however, from which a jury can infer that it is the body of B. Upon A's trial, his attorney moves for a dismissal of the case upon the ground that the district attorney cannot prove by direct proof that the body found is that of B. What should be the ruling of the court?

A. The motion should be denied, as the identity of the body found is not a part of the *corpus delicti*. Section 1041 of the Penal Law says: "No person can be convicted of murder or manslaughter, unless the death of the person alleged to have been killed, and the fact of killing by defendant, as alleged, are each established as independent facts; the former by direct proof, and the latter beyond a reasonable doubt." This section has been elaborately discussed in the case of *People v. Palmer*, 109 N. Y. 110, where it was held that the identity of the person killed need not be established by direct proof; it is only the death of the person alleged to have been killed, must be proven by direct proof, and the killing by defendant beyond a reasonable doubt. In the case of *Ruloff v. People*, 18 N. Y. 179, it was said that: "The death of the person alleged to have been killed was not established, but in its place was put the equivocal fact of a sudden and unexplained disappearance, the evidence might be true and the person alleged to have been killed might be living and not dead." In the last case, no body was found, there was a sudden, suspicious and unexplained absence of the person alleged to have been killed; the court said that the death was not shown, in fact no death was shown, nobody being found, there was a suspicious disappearance from which a jury might infer that there was a murder, but this did not come up to the requirement of the law. See also *People v. Bennett*, 49 N. Y. 137; *People v. Place*, 157 N. Y. 584; *People v. Benham*, 160 N. Y. 425.

Q. A strikes B with his fist. B immediately draws a pistol and shoots A dead. B is indicted, and on his trial, his counsel

moves for his discharge, on the ground that the killing was done in self-defense. Should the motion be granted?

A. No. "One who is without fault himself, when attacked by another, may kill his assailant, if the circumstances be such as to furnish reasonable ground for apprehending a design to take away his life, or to do him some great bodily harm, and the danger is imminent. But this principle will not justify one in returning blows with a dangerous weapon when he is struck with the naked hand, and there is no reason to apprehend a design to do him great bodily harm. Nor will it justify homicide when combat can be avoided, or where after it has been commenced, the party can withdraw from it in safety before he kills his adversary." *Shorter v. People*, 2 N. Y. 193; *People v. Taylor*, 177 N. Y. 237; *People v. Governale*, 193 N. Y. 588.

Q. A is attacked by B in his (A's) own house. A resists the attack, and in the course of the fight believing that his life was in danger, does not retreat, but seizes a pistol from the table and shoots B dead. At the trial of A for murder, the court charges the jury that if A could have gotten out of the house, or anywhere to a place of safety, he should have done so, and that he had no right to use the weapon, unless all reasonable means of retreat were cut off. A is convicted and appeals, his counsel having taken due exception to the charge. How should the appellate court decide?

A. The judgment should be reversed, and a new trial ordered, as the charge was erroneous. Where a man is assailed in his own house, he need not flee as far as he can, as in other cases of self-defense, and if the situation is such that he, as a reasonable man, believes that he is about to be murderously attacked, he has the right to stand his ground. "It is not now, and never has been the law that a man assailed in his own dwelling, is bound to retreat. If assailed there, he may stand his ground, and resist the attack. He is under no duty to take to the fields and the highways, a fugitive from his own home. Flight is for sanctuary and shelter, and shelter, if not sanctuary is in

the home. That there is, in such a situation, no duty to retreat is, we think, the settled law in the United States. . . . It was so held by the United States Supreme Court in *Beard v. United States*, 158 U. S. 550. In that case there was a full review of the authorities, and the rule was held to extend not merely to one's house, but also to the surrounding grounds. We think that if the situation justified the defendant as a reasonable man in believing that he was about to be murderously attacked, he had the right to stand his ground. General statements to the effect that one who is attacked should withdraw, must be read in the light of the facts that led up to them. We think also that there is nothing in the statutes of this state that enlarges in such conditions the duty to retreat. The present statute (Penal Law, sec. 1055) is a re-enactment in substance of the revised statutes." Cardozo, J., in *People v. Tomlins*, 213 N. Y. 240.

Q. A burglariously breaks into the house of B. B attempts to capture him, and while so doing is shot dead by A. A is arrested and indicted for murder in the first degree. At the trial, his attorney asks for a dismissal of the indictment on the ground that there was no premeditation and deliberation. What should be the ruling of the court?

A. The motion should be denied. The killing of any human being, while engaged in the commission of a felony (as a burglary) is murder in the first degree, whether the felony was committed upon or affects any person or concerns property only. *People v. Greenwall*, 115 N. Y. 520; *People v. Pekarz*, 185 N. Y. 470. Section 1044 of the Penal Law defines murder in the first degree as follows: "The killing of a human being, unless it is excusable or justifiable, is murder in the first degree, when committed: 1. From a deliberate and premeditated design to effect the death of the person killed, or of another; or 2. By an act imminently dangerous to others, and evincing a depraved mind, regardless of human life, although without a premeditated design to effect the death of any individual; or without a design to effect death, by a person engaged in the

commission of, or in an attempt to commit a felony, either upon or affecting the person killed or otherwise; or 3. When perpetrated in committing the crime of arson in the first degree. 4. A person who willfully, by loosening, removing or displacing a rail, or by any other interference, wrecks, destroys or so injures any car, tender, locomotive or railway train, or part thereof, while moving upon any railway in this state, whether operated by steam, electricity or other motive power, as to thereby cause the death of a human being, is guilty of murder in the first degree, and punishable accordingly."

Q. A and B are engaged in a quarrel, and come to blows. B strikes A with his fist causing A to fall down and fatally injure himself. B is indicted and tried for murder. Can he be convicted?

A. He can only be convicted of manslaughter in the second degree. Section 1052 of the Penal Law, defining manslaughter in the second degree, is, in part, as follows: "Such homicide is manslaughter in the second degree when committed without a design to effect death: 1. By a person committing or attempting to commit a trespass, or other invasion of a private right, either of the person killed, or of another, not amounting to a crime; or, 2. In the heat of passion, but not by a dangerous weapon or by the use of means either cruel or unusual; or, 3. By any act, procurement or culpable negligence of any person, which according to the provisions of this article, does not constitute the crime of murder in the first or second degree, nor manslaughter in the first degree." A homicide can only be classed as manslaughter when there is no design to kill; when that purpose is present, the crime is murder in one of its degrees. Deliberation is there, when there is sufficient opportunity for reflection, that reflection was had, and choice was made with full opportunity to choose otherwise. *People v. Beckwith*, 103 N. Y. 360.

Q. Define justifiable and excusable homicide, and are the terms synonymous?

A. The terms are not synonymous. Excusable homicide is defined in sec. 1054 of the Penal Law as follows: "Homicide is excusable when committed by accident and misfortune, in lawfully correcting a child or servant, or in doing any other lawful act, by lawful means, with ordinary caution, and without any unlawful intent." Section 1055 defines justifiable homicide, and is as follows: "Homicide is justifiable when committed by a public officer, or a person acting by his command and in his aid and assistance. 1. In obedience to the judgment of a competent court; or, 2. Necessarily, in overcoming actual resistance to the execution of the legal process, mandate or order of a court or officer, or in the discharge of a legal duty; or 3. Necessarily, in retaking a prisoner who has committed, or has been arrested for, or convicted of a felony, and who has escaped or has been rescued, or in arresting a person who has committed a felony and is fleeing from justice; or in attempting by lawful ways and means to apprehend a person for a felony actually committed, or in lawfully suppressing a riot, or in lawfully preserving the peace. Homicide is also justifiable when committed: 1. In the lawful defense of the slayer, or of his or her husband, wife, parent, child, brother, sister, master or servant, or of any other person in his presence or company, when there is reasonable ground to apprehend a design on the part of the person slain to commit a felony, or to do some great personal injury to the slayer, or to any such person, and there is imminent danger of such design being accomplished; or 2. In the actual resistance of an attempt to commit a felony upon the slayer, in his presence, or upon or in a dwelling or other place of abode in which he is."

Q. A and B were jointly indicted for robbery. Against the objection of B, they were jointly tried and convicted. Will the conviction stand on appeal?

A. No. Robbery being a felony, they were entitled to separate trials according to sec. 391 of the Code of Crim. Pro., which is as follows: "When two or more defendants are jointly indicted for a felony, any defendant requiring it, must be

tried separately. In other cases, defendants jointly indicted, may be tried separately or jointly, in the discretion of the court." See *People v. Cotto*, 131 N. Y. 577.

Q. A is standing on a street corner, and takes his wallet from his pocket for the purpose of taking a coin therefrom to purchase something. B comes along and snatches the wallet from A's hand. Is B guilty of robbery?

A. No. This is merely larceny and not robbery. Violence as used in the Penal Law implies overcoming, or attempting to overcome an actual resistance, or preventing such resistance through fear. "The mere snatching of anything from the hand of a person without any struggle or resistance by the owner, or any force or violence on the part of the thief, will not constitute robbery." *McCloskey v. People*, 5 Park. Cr. Rep. 299; *People v. Hall*, 6 Park. Cr. Rep. 642. Section 2120 of the Penal Law, defines robbery as follows: "Robbery is the unlawful taking of personal property, from the person or in the presence of another, against his will, by means of force, or violence, or fear of injury, immediate or future, to his person or property, or the person or property of a relative or member of his family, or of anyone in his company at the time of the robbery."

Q. A picks B's pocket and runs off. B pursues him, and upon coming up to him attempts to seize him. A, for the purpose of effecting his escape draws a pistol, whereupon B desists. Several days later A is arrested, and subsequently indicted and tried for robbery. Can he be convicted of that crime?

A. No, for this is not robbery, according to sec. 2121 of the Penal Law, which is as follows: "To constitute robbery, the force or fear must be employed either to obtain or retain possession of the property or to prevent or overcome resistance to the taking. If employed merely as a means of escape it does not constitute robbery." Here the property was obtained without force or fear; the force or fear by the drawing of the pistol was used for the purpose of escape, therefore A

cannot be convicted of robbery. He was guilty of larceny. *People v. McGinty*, 24 Hun, 62; *Hope v. People*, 83 N. Y. 418.

Q. A takes B's watch and chain from his (B's) pocket. B, upon discovering this, grapples with him and attempts to re-take his property, whereupon A strikes him a heavy blow causing B to release his hold upon the watch and chain. A then makes good his escape with the property. Of what crime is A guilty?

A. A is guilty of robbery. The force was here employed for the purpose of retaining possession of the property, and constitutes robbery within the provisions of secs. 2120 and 2121 of the Penal Law, *supra*. "Although the thief may have secured possession of the property of another without force or violence, the removal of the property from the presence of that other with force or violence constitutes robbery." *People v. Glynn*, 54 Hun, 332, *aff'd* 123 N. Y. 631.

Q. A, on boarding a street car, is seized by B around the arms and his wallet extracted from his pocket. B runs off, and is subsequently arrested. Of what crime is he guilty?

A. B is guilty of robbery, as it matters not what degree of force is used. *Mahoney v. People*, 3 Hun, 202, *aff'd* 59 N. Y. 659. Section 2122 of the Penal Law provides that: "When force is employed in either of the ways specified in the last section, the degree of force employed is immaterial."

(NOTE.) Section 2123 provides that: "The taking of property from the person of another is robbery, when it appears that although the taking was fully completed without his knowledge, such knowledge was prevented by the use of force and fear."

Q. A and B are husband and wife. A, the husband, leaves the country, and is not heard of for more than five years. B, the wife, believing him to be dead, marries C. Of what crime, if any, is B guilty?

A. B is not guilty of any crime, within the meaning of secs. 340 and 341 of the Penal Law, which are as follows: "A person

who, having a husband or wife living, marries another person, is guilty of bigamy and is punishable by imprisonment in a penitentiary or state prison for not more than five years." Section 341 says: "The last section does not extend, 1. To a person whose former husband or wife, has been absent for five years successively then last past, without being known to him or her within that time to be living, and believed by him or her to be dead; or 2. To a person whose former marriage has been pronounced void, or annulled, or dissolved, by the judgment of a court of competent jurisdiction for a cause other than his or her adultery; or 3. To a person who, being divorced for his or her adultery, may be permitted to marry again under the provisions of section eight of the domestic relations law; or 4. To a person whose former husband or wife has been sentenced to imprisonment for life."

Q. A, the wife of B, learns that B is living in another state with another woman. A consults a lawyer, and asks him if she may lawfully marry again. The lawyer informs her that she could. A acts in good faith, and states all the facts to the lawyer. She marries again after five years. What crime, if any, is she guilty of?

A. A is guilty of bigamy, for according to sec. 341, *supra*, the husband or wife, in order to have the right to marry again, after an absence of five years, must believe the other to be dead, and the advice of counsel does **not** alter the matter. The case of *People v. Meyer*, 8 State Rep. 256, is in point. "The defendant was asked whether he had stated to a lawyer that his wife was absent over five years, that he had made diligent search to ascertain her whereabouts, and was unable to do so; also whether the lawyer did not inform him that he had a right to marry. Held, that the questions had no material bearing on the question of his belief in the death of his wife, and were incompetent."

Q. A, an unmarried man, marries B knowing her to be the wife of C, and also knowing that C is living in Canada. Of what crime, if any, is A guilty?

A. A is guilty of bigamy, according to sec. 343 of the Penal Law, which is as follows: "A person who knowingly enters into a marriage with another, which is prohibited to the latter by the provisions of this article is punishable by imprisonment in a penitentiary or state prison, for not more than five years, or by a fine of not more than one thousand dollars or both."

Q. A and B were legally married. One year later he marries C, B still being alive. A and B were never divorced, nor was their marriage annulled. Very shortly after this second marriage B dies. A then deserts C and marries D. C has him arrested, and indicted for bigamy. Can he be convicted?

A. No. The second marriage to C during B's lifetime, was of course bigamous and therefore void. After B's death, A had no lawful wife living, therefore his marriage to D was perfectly legal, and hence he could not be convicted of bigamy. Section 340, *supra*. *Fenton v. Reed*, 4 Johns. 52; *Price v. Price*, 124 N. Y. 589.

Q. A's coachman is sleeping in a room which is fitted up for him in A's barn. B, thinking that the coachman has gone away for the night, sets fire to the barn, but the fire is extinguished before any material harm is done. B is indicted, tried and convicted of arson in the first degree. On appeal, B's counsel asks that the judgment be reversed on the following grounds: (a) That the indictment did not allege or the proof show any intention to burn the building. (b) That B did not know that there was a man in the building. (c) That the barn was not a dwelling house. (d) That nobody was injured. Should the judgment be reversed? State your opinion on each one of these subdivisions.

A. (a) This contention is not valid. It is not necessary to charge in an indictment, for arson in the first degree, or to prove upon the trial that the defendant set the fire with the intent to destroy the building. *People v. Fanshawe*, 137 N. Y. 68. (b) It is not necessary that the defendant should know that a human being is present in the building, if it is a dwelling

house, according to sec. 221 of the Penal Law, which is as follows: "A person who willfully burns, or sets on fire, in the nighttime: 1. A dwelling house in which there is, at the time, a human being; or 2. A car, vessel, or other vehicle, or a structure or building other than a dwelling house, wherein, to the knowledge of the offender, there is, at the time, a human being, is guilty of arson in the first degree." (c) The barn was a dwelling house. "Any building is a dwelling house, within the act defining arson in the first degree, which is in whole or in part usually occupied by persons lodging therein at night, although other parts, or the greater part may be occupied for an entirely different purpose." *People v. Orcutt*, 1 Park. Cr. Rep. 252. Section 220 of the Penal Law re-enacts the rule laid down in this case. (d) It is not necessary that anybody should be injured in order to constitute arson. For these reasons, the judgment should be affirmed.

(NOTE.) Though there must be an actual burning to constitute the offense, it is not necessary that the building should be consumed or materially injured. If any part, however small, is consumed, it is sufficient. A flame is not necessary. Charring constitutes a burning. Mere scorching or discoloration is not enough. See *People v. Butler*, 16 Johns. 203.

Q. Is it a crime for a man to burn his own property, and if so, what?

A. Yes. It is arson. *Shepard v. People*, 19 N. Y. 537. Section 227 of the Penal Law provides as follows: "To constitute arson, it is not necessary that another person than the defendant should have had ownership in the building set on fire."

Q. A feloniously in the nighttime set fire to the house of B, which directly adjoined A's house. By reason of a heavy wind the sparks are communicated to the house of C, resulting in its destruction. Thereafter A is charged with arson, and indicted for having burnt C's house. Can he be convicted?

A. Yes. Section 226 of the Penal Law is as follows: "Where an appurtenance to a building is so situated with reference

to such building, or where any building is so situated with reference to another building, that the burning of the one is deemed a burning of the other, within the foregoing provisions, against any person actually participating in the original setting on fire, as of the moment when the fire from the one communicates to and sets on fire the other." *Hennessy v. People*, 22 N. Y. 178; *Arkell v. Ins. Co.*, 69 N. Y. 193; *People v. Nolan*, 115 N. Y. 660.

Q. A intended feloniously to set fire to the house of B, but through a mistake went to the house of C, to which he set fire on the outside, and just as the fire began to catch, a violent rain storm came up and extinguished the fire. The damage done to C's house was very slight and inconsequential. Can A be convicted of arson under the circumstances or not? If so, why so? If not, why not?

A. Yes. An indictment for burning one house is sustained by proof of the burning of another, with the criminal intent of burning the house specified. *Woodford v. People*, 62 N. Y. 117.

Q. A asked B to set fire to C's barn, and gave him material for the purpose. A did not mean to be present at the commission of the offense, and B never intended to commit it, and in fact never set the barn on fire. Of what crime, if any, is A guilty of?

A. A is guilty of an attempt to commit arson. The fact that A prepared the combustibles, and solicited another to use them in burning the barn, is sufficient to constitute an attempt. "We have then the fixed design of the defendant to burn this barn, and overt acts towards the commission of the offense, and a failure in the perpetration of it. The offense, then, is fully made out, for the intent to do the wrongful act, coupled with the overt acts towards its commission, constitutes the attempt spoken of by the statute." *McDermott v. People*, 5 Park. Cr. Rep. 36; *People v. Bush*, 4 Hill, 133.

Q. A sets fire to his trunk containing all his clothing for the purpose of defrauding the insurance company. The clothing

is consumed, but no part of the building is burned. He is indicted and tried for arson. Can he be convicted?

A. No. Setting fire to personal property in a building will not constitute the crime of arson, if no part of the house itself is burned. *Dedieu v. People*, 22 N. Y. 178. It may, however, be held to be malicious mischief according to sec. 1421 of the Penal Law.

Q. A was detected in burglarizing the storehouse of B, and when pursued accidentally kicked a lighted lamp to the floor which set fire and consumed the entire building. Can A be convicted of arson?

A. No. "The burning of a building under circumstances which show beyond a reasonable doubt that there was no intent to destroy it, is not arson." Section 225 of the Penal Law. Providing as in this case that the building is one of the kind mentioned in sec. 223 of the Penal Law, the burning of which amounts to arson in the third degree. *People v. Fanshawe*, 137 N. Y. 74. Section 223 provides as follows: "A person who willfully burns, or sets on fire a vessel, car or other vehicle, or a building, structure, or other erection, under circumstances not amounting to arson in the first or second degree, is guilty of arson in the third degree."

Q. A agrees with B, a servant of C's, that at an appointed time, B shall unlock the door of C's house, so that A might come in C's house and commit burglary. The door is unlocked by B and A enters, but before he takes away anything he is frightened away, and is afterwards arrested. Upon the trial for burglary, the defendant's attorney asks the court to charge the jury to acquit the defendant on the ground that burglary was not committed. What should have been the ruling of the court? State your reasons.

A. The motion should be denied, for A has committed burglary. There was a break within the meaning of that term as defined in sec. 400 of the Penal Law, which in part

is as follows: "The word 'break' as used in this article, means and includes: 1. Breaking or violently detaching any part, internal or external, of a building; or 2. Opening, for the purpose of entering therein, by any means whatever, any outer door of a building, or of any apartment or set of apartments therein separately used or occupied, or any window, shutter, scuttle, or other thing, used for covering or closing an opening thereto or therein, or which gives passage from one part thereof to another; or 3. Obtaining an entrance into such a building or apartment, by any threat or artifice used for that purpose, or by collusion with any person therein; or 4. Entering such a building or apartment by or through any pipe, chimney or other opening, or by excavating, digging, or breaking through or under the building, or the walls or foundation thereof."

(NOTE.) To constitute the crime of burglary, there must be both a break and an entry. Burglary in the first degree is defined in sec. 402 of the Penal Law as follows: "A person, who with intent to commit some crime therein, breaks and enters, in the nighttime, the dwelling house of another, in which there is at the time a human being (1) Being armed with a dangerous weapon; or (2) Arming himself therein with such a weapon; or (3) Being assisted by a confederate, actually present; or (4) Who, while engaged in the nighttime in effecting such entrance, or in committing any crime in such a building, or in escaping therefrom, assaults any person, is guilty of burglary in the first degree."

Q. A climbs upon the roof of a dwelling house, and by means of a rope ladder climbs down the chimney and into the house without disturbing any article of furniture, takes a gold watch, and retires as he came. Of what crime or crimes is he guilty?

A. He is guilty of burglary, for there is a break within the meaning of sec. 400 of the Penal Law, *supra*.

Q. A, a tramp, passes a farmhouse, and seeing a window open, enters the house through it and sleeps there for the night. Upon awakening in the morning he takes some silverware, and is about to depart when he is discovered and arrested. He is indicted and tried for burglary. Can he be convicted of that crime?

A. No. This is not burglary for there was no break. One who obtains entrance to a house through an open window is not guilty of burglary. *People v. Arnold*, 6 Park. Cr. Rep. 638.

(NOTE.) Raising a window sash constitutes a breaking; so also the pushing open of a closed but unfastened transom. *People v. Edwards*, 1 Wheeler Cr. Rep. (N. Y.) 374. A removal of props from the door in order to open and enter is a breaking, but if a door or window is a little way open, it is not a breaking to push it further open. 5 Am. & Eng. Ency. of Law, 45; *People v. Bush*, 3 Park. Cr. Rep. 552.

Q. A goes to B's house with the intention of robbing the same. The door is closed but not locked. A opens the door and enters the house, but is discovered and arrested before he commences to act. Of what crime, if any, is A guilty?

A. A is guilty of burglary. "Where the door of a house is tightly closed without being either bolted, locked or fastened, it is burglary to open it and enter the house with the purpose of stealing." *Tickner v. People*, 6 Hun, 657.

Q. A stopped at the house of B and asked B's daughter for a drink of cider, offering to pay for it. She refused to let him have it, and he thereupon opened the door of the house although forbidden to do so by her, went in and drank some cider. He was arrested and indicted for burglary. Is he guilty of that crime?

A. No. "Here the accused did not enter with the intent to commit a crime. While he intended to obtain a drink of cider and thus deprive B of his property, there was an absence of the circumstances ordinarily attending the commission of a larceny, and which distinguishes it from a trespass, and all the circumstances were consistent with the view that the transaction was a trespass merely. Every breaking does not constitute burglary; there must be a felonious intent." *McCourt v. People*, 64 N. Y. 583.

Q. A is suddenly awakened one night by a violent ringing of his door bell. He opens the window and sees B, who says

he has a telegram for A. A goes downstairs and opens the door. B immediately thrusts a pistol in A's face and demands entrance. A grapples with B, who releases himself and runs off. B had no telegram, and intended to rob A's house after gaining entrance by this subterfuge. What crime, if any, has B committed?

A. B has committed the crime of burglary in the first degree within the meaning of sec. 402 of the Penal Law, *supra*. He obtained entrance by an artifice, which constituted a break under sec. 400 of the Penal Law, *supra*. There was an entry within the meaning of sec. 400, as the pistol was thrust into the building. Enter is defined in sec. 400 of the Penal Law as follows: "The word 'enter' as used in this article, includes the entrance of the offender into such building or apartment, or the insertion therein of any part of his body or of any instrument or weapon held in his hand, and used, or intended to be used, to threaten or intimidate the inmates, or to detach or remove property."

Q. A breaks a window in a jewelry store, and projects a stick into the window for the purpose of removing some jewelry and stealing the same. He is arrested. Of what crime, if any, is he guilty?

A. A is guilty of burglary, for there was both a break and an entry within the meaning of the statute. Section 400, *supra*.

Q. A, intending to rob the store of B, bored a hole through the door with a centerbit; but before he could proceed any further he was discovered and arrested. Part of the chips were found on the inside of the store, from which it was apparent that the end of the centerbit had penetrated into the house. A is indicted and tried for burglary. Can he be convicted of that crime?

A. No. The instrument was not introduced into the building for the purpose of taking property. While there was a

sufficient breaking, there was not a sufficient entry to constitute a burglary. If the instrument is used solely for the purpose of effecting an entry, and not for the purpose of committing the contemplated felony, it will not amount to a burglarious entry. Section 400, *supra*. Of course A is guilty of attempting to commit burglary.

Q. A servant of B, pretending to be acting in accord with C, who intended to burglarize B's house, agreed with C that on a signal to be given him, she would open the door and let him in. The servant, having informed B of the affair and her arrangement, was instructed by him to carry out her arrangement which she did, and on C's entering the house, he was at once arrested by an officer concealed therein, indicted, tried and convicted of burglary. Would the conviction stand on appeal? If not, what is the trouble? State your reasons.

A. The judgment of conviction should be reversed. A person cannot be guilty of burglary who enters the house by permission of the servant of the owner, the latter knowing at the time that the person wishes to enter to steal. It is in effect a consent to the entry by such person, and is not even a trespass. Here the servant was the agent of the owner of the house in the transaction, and whatever the agent did in conformity to his instructions, must be treated as done by the principal. It seems that there are no New York decisions on this point, but the case of *Allen v. State*, 40 Ala. 334 (91 Amer. Dec. 477) is exactly in point, and it was there so held.

Q. A has a fruit stand erected on a street against a building. This stand has both a window and a door. B, in the nighttime, while A was sleeping therein, breaks and enters into it, and takes therefrom \$10. He is subsequently arrested and indicted for burglary. Upon the trial, B's counsel moves for a dismissal of the indictment, on the ground that the stand was not a building within the meaning of the Penal Law, and therefore could not be the subject of burglary. What should be the ruling of the court? State your reasons.

A. The motion should be denied. The stand was a booth under sec. 400 of the Penal Law, which provides: "The term 'building' as used in this article, includes a railway car, vessel, booth, tent, shop, inclosed ginseng garden, or other erection or inclosure." It was so held in the case of *People v. Hagan*, 37 State Rep. 660.

(NOTE.) A vault in a cemetery is not included within the terms "building, erection or inclosure" as used in the Penal Law defining burglary. *People v. Richards*, 108 N. Y. 137. The chamber of a guest at a hotel is not his dwelling house, but that of the landlord; therefore an indictment charging one to have attempted to enter the dwelling house of A, and it appearing that an attempt was made to enter a room in a hotel assigned to A, was held fatally defective. *Rodgers v. People*, 86 N. Y. 360. A store was under the same roof of a dwelling house; there was no internal communication between the store and upper rooms. Held, that an entry into the store was an entry into a dwelling house. *Quinn v. People*, 71 N. Y. 561. See also *People v. Gartland*, 30 App. Div. 534.

Q. A upon entering his home carelessly leaves the outer door ajar, and B slips in unnoticed by A and hides in a closet. Thereafter when A and his family are about to retire for the night, A locks the outer door. When all is quiet B comes forth from his hiding place, takes some valuable jewelry from a dressing table in one of the rooms, makes his way to the outer door, and finding it locked forces it open and makes good his escape. He is later arrested. Of what crime if any, can he be convicted?

A. Burglary in the third degree, as he broke out of the house. Section 404 of the Penal Law provides that: "A person who, 1. With intent to commit a crime therein, breaks and enters a building, or a room, or any part of a building; or 2. Being in any building, commits a crime therein and breaks out of the same, is guilty of burglary in the third degree."

(NOTE.) Section 405 of the Penal Law provides as follows: "A person who, under circumstances or in a manner not amounting to a burglary, enters a building, or any part thereof, with intent to commit a felony or a larceny, or any malicious mischief, is guilty of a misdemeanor." Under this section it is not necessary to have a break, or forcible entry in order to constitute

the crime. *People v. Corcoran*, 34 Misc. 332; *People v. Meegan*, 104 N. Y. 531.

Q. A while traveling on a street car with B, puts his hand into B's coat pocket, and lifts the pocketbook of the latter containing \$100 about halfway out of the pocket. He is discovered by a detective who happens to be in the car, and is arrested. He is subsequently indicted for larceny. On his trial, his attorney asks that the indictment be dismissed on the ground that there was not a sufficient carrying away to constitute larceny. What should be the ruling of the court?

A. The motion should be denied. To constitute the offense of larceny, there must be a taking of the goods from the power or control of the owner. A temporary possession, however, by the thief, though but for a moment, is sufficient. Hence this was larceny and it was so held in *Harrison v. People*, 50 N. Y. 518.

Q. A goes to the house of B in B's absence, and represents to B's wife, C, that B has been arrested, and has sent A to get the watch, which he wishes to pawn and secure bail, all of which is false. C gives the watch to B. Is B guilty of any crime, or simply conversion?

A. B is guilty of larceny. If by trick or artifice, the owner of property is induced to part with the custody or naked possession for a special purpose to one, who received the property with a felonious intent, the owner still meaning to retain the right of property, the taking is larceny. *Smith v. People*, 53 N. Y. 111; *People v. Lawrence*, 137 N. Y. 517.

(NOTE.) The common-law distinction between larceny, embezzlement, and obtaining goods under false pretenses is abrogated, and is now included in sec. 1290 of the Penal Law, which is as follows: "A person who, with the intent to deprive or defraud the true owner of his property, or of the use and benefit thereof, or to appropriate the same to the use of the taker, or of any other person: 1. Takes from the possession of the true owner, or any other person; or obtains from such possession by color or aid of fraudulent or false representation or pretense, or of any false token or writing; or secretes, withholds, or appropriates to his own use, or that of any person other

than the true owner, any money, personal property, thing in action, evidence of debt or contract, or article of value of any kind; or 2. Having in his possession, custody, or control, as a bailee, servant, attorney, agent, clerk, trustee, or officer of any person, association, or corporation, or as a public officer, or as a person authorized by agreement, or by competent authority, to hold or take such possession, custody, or control, any money, property, evidence of debt or contract, article of value of any nature, or thing in action or possession, appropriates the same to his own use, or that of any other person other than the true owner or person entitled to the benefit thereof, steals such property, and is guilty of larceny."

Q. A was indicted for obtaining goods under false pretenses and representations. At the time of the purchase, he offered his check dated the next day in payment for the goods, saying that there would be plenty of money to meet the check when due. The dealer, relying on his representations, took the check and delivered the goods, and presented the check for payment at the bank on which it was drawn the next day, when payment was refused. It turned out that A never had an account in the bank, and at the time of the transaction did not intend to pay the check. The facts being conceded, is A guilty or not guilty and why?

A. A is guilty. The case of *Lesser v. People*, 73 N. Y. 78, is exactly in point. It was there held that the circumstances tended to show the transaction to be a device on the part of the prisoner to defraud the complainant; that the fact that the check was postdated, did not under the circumstances make the transaction simply an undertaking that the money to meet it would be in the bank at its maturity; and that the facts justified a conviction. Cases of this kind are governed by sec. 1293 of the Penal Law, which is as follows: "A person who willfully, with intent to defraud, by color or aid of a check or draft, or order for the payment of money or the delivery of property, when such person knows that the drawer or maker thereof is not entitled to draw on the drawee for the sum specified therein, or to order the payment of the amount, or delivery of the property, although no express representation is made in reference thereto, obtains from another any money or

property, is guilty of stealing the same and punishable accordingly."

Q. A finds a gold brooch on which B's name is engraved. A is acquainted with B and knows where she can be found. A, however, says nothing to B, but uses the property as his own. What remedy or remedies, if any, has B?

A. B can sue A in conversion or replevin. A is also guilty of larceny under sec. 1300 of the Penal Law, which is as follows: "A person, who finds lost property under circumstances which give him knowledge or means of inquiry as to the true owner, and who appropriates such property to his own use, or to the use of another person who is not entitled thereto, without having first made every reasonable effort to find the owner and restore the property to him, is guilty of larceny."

Q. A steals some money and a watch in Albany County. He takes it into Oneida County, and is there arrested, and the money and watch are found on his person. He is tried in Oneida County, and at the completion of the evidence, the counsel for the prisoner asks the court to direct the jury to acquit the prisoner, on the ground that the crime was committed in Albany County. What should the court do?

A. The court should deny the motion. A prisoner may be convicted of larceny in any county into which he carries the goods stolen by means of the larceny. *Haskins v. People*, 16 N. Y. 344; *Wills v. People*, 3 Park. Cr. Rep. 473; *People v. Dowling*, 84 N. Y. 478.

(NOTE.) Section 1301 of the Penal Law provides as follows: "A person, who having, at any place without the state, stolen the property of another, or receives such property, knowing it to have been stolen, brings the same into this state, may be convicted and punished in the same manner as if such larceny or receiving had been committed within the state. Complaint may be made and the indictment found and tried, and the offense may be charged to have been committed, in any county into or through which the stolen property is brought."

Q. Upon the trial of A for robbery, the jury rendered a verdict of guilty of larceny from the person. A's attorney moves to set aside the verdict as not being in conformity with the indictment. How should the court decide?

A. The motion should be denied and the verdict allowed to stand. "The robbery charged embraced 'larceny from the person' because, if there had been an actual felonious taking, not accompanied with the force and violence, or the fear of immediate injury to the person, necessary to constitute robbery, the crime would drop in grade to the less heinous offense of larceny." *Murphy v. People*, 3 Hun, 115. See also *People v. Stacy*, 119 App. Div. 748.

(NOTE.) Section 610 of the Penal Law provides as follows: "Upon the trial of an indictment, the prisoner may be convicted of the crime charged therein, or of a lesser degree of the same crime, or of an attempt to commit the crime so charged, or of an attempt to commit a lesser degree of the same crime."

Q. A commits burglary in Westchester County. He is arrested in Albany County on a warrant issued in Westchester County. A claims to be entitled to be admitted to bail in Albany County. A consults you. What advice would you give?

A. A's contention is not valid. Where by a warrant, an arrest be directed for a felony, the magistrate issuing it has exclusive jurisdiction, except in case of his absence or inability to act, to examine, commit to bail, or discharge a prisoner arrested under such a warrant. *People v. Navagh*, 4 N. Y. Cr. Rep. 289. The distinction must be drawn between arrests for felonies and misdemeanors. Section 158 of the Code of Crim. Pro. provides as follows: "If the crime charged in the warrant be a felony, the officer making the arrest must take the defendant before the magistrate who issued the warrant, or some other magistrate in the same county, as provided for in section one hundred and sixty-four." Section 159 of the Code of Crim. Pro. says: "If the crime charged in the warrant be a misdemeanor, and the defendant be arrested in another

county, the officer must, upon being required by the defendant, take him before a magistrate in that county, who must admit the defendant to bail, for his appearance before the magistrate named in the warrant, and take bail from him accordingly." *People v. Clews*, 77 N. Y. 39.

Q. In what cases may a private person arrest another?

A. Section 183 of the Code of Crim. Pro. provides: "A private person may arrest another: 1. For a crime committed or attempted in his presence; 2. When the person arrested has committed a felony, although not in his presence."

(NOTE.) Section 177 enumerating the cases in which a police officer may arrest without a warrant, in addition to the two cases given in sec. 183, *supra*, adds a third which is as follows: "When a felony has in fact been committed, and he has reasonable cause for believing the person to be arrested to have committed it."

Q. Upon the trial of A for perjury it appeared that the defendant did not know the materiality of the evidence he swore to, and that it did not affect the proceedings for which it was made. A's attorney moved for a dismissal of the indictment. What did the court do?

A. The motion was denied, for sec. 1624 of the Penal Law provides: "It is no defense for a prosecution for perjury that the defendant did not know the materiality of the false statement made by him; or that it did not in fact affect the proceedings in or for which it was made. It is sufficient that it was material, and might have affected such proceeding." *People v. Teal*, 196 N. Y. 372.

Q. A is being tried for robbing B of a diamond stud. The indictment alleges that the robbery occurred on the 10th of May, 1908, and that the property taken belongs to B. The evidence shows that the robbery took place on the 18th day of May, and that the stud was one loaned to B, and the property of C. A's counsel asks the court to instruct the jury to acquit the defendant on the ground that there is a variance between

the indictment and the proof. What should be the ruling of the court?

A. The motion should be denied. A variance between the averment in an indictment and the proof, as to the day on which the crime was committed, may be disregarded and the indictment amended. *People v. Jackson*, 111 N. Y. 362; *People v. Hyatt*, 172 N. Y. 204. "In an indictment for larceny it is regular and proper to allege the ownership of the stolen property to be in the lawful custodian or bailee. Under sec. 293 of the Code of Crim. Pro., the court has power to allow the indictment to be amended by changing the name of the owner of the property from the name of the alleged owner." *People v. Herman*, 6 N. Y. Crim. Rep. 194. Section 280 of the Code of Crim. Pro. provides as follows: "The precise time at which the crime was committed need not be stated in the indictment; but it may be alleged to have been committed at any time before the finding thereof, except where the time is a material ingredient in the crime." Section 293 says: "Upon the trial of an indictment, when a variance between the allegations therein and the proof, in respect to time, or in the name or description of any place, person or thing, shall appear, the court may, in its judgment, if the defendant cannot be thereby prejudiced in his defense on the merits, direct the indictment to be amended, according to the proof, on such terms . . . as the court may deem reasonable."

Q. An indictment charges three counts: 1. Burglary, by breaking and entering the dwelling house of B in the nighttime. 2. Grand larceny, by feloniously taking and carrying away articles of property in the house. 3. For receiving the stolen property mentioned in count two. Is the indictment good, under that section of the Code of Crim. Pro. which prohibits indictments for more than one crime?

A. The indictment is good. The rule stated in sec. 278 of the Code of Crim. Pro. that the indictment must charge but one crime, is subject to but one exception stated in sec. 279,

which is as follows: "The crime may be charged in separate counts to have been committed in a different manner or by different means; and where the acts complained of may constitute different crimes, such crimes may be charged in separate counts." See *Hawker v. People*, 75 N. Y. 487. "So long as the counts relate to the same transaction there is no objection to joining them in the same indictment, even though constituting offenses of different grades and demanding different punishments." *People v. Wilson*, 109 N. Y. 351; *People v. Adler*, 140 N. Y. 330.

Q. A meets B and agrees with him that at an appointed hour the next night they would set fire to the house of C. For some reason or other nothing was done or said about it, and the matter was dropped. What crime, if any, were they guilty of?

A. They were guilty of a misdemeanor, the crime of conspiring to commit arson. No overt act was necessary. This is provided for in sec. 583 of the Penal Law as follows: "No agreement except to commit a felony upon the person of another, or to commit arson or burglary amounts to a conspiracy, unless some act beside such agreement be done to effect the object thereof, by one or more of the parties to such agreement." *People v. Flack*, 125 N. Y. 324; *People v. Sheldon*, 139 N. Y. 251; *People v. Marcus*, 185 N. Y. 257.

Q. A having been arrested on a murder charge, demands an examination when he is brought before the magistrate. A appears at the examination with counsel, and B is called as a witness by the prosecution, and his evidence taken down in writing by the magistrate. A's counsel does not cross-examine B although he had the opportunity to do so. B's evidence was duly signed by him and certified by the magistrate. A was later indicted. At the trial, B having since died, the prosecuting attorney offered B's deposition in evidence. A's counsel objects, claiming a violation of the prisoner's constitutional rights. What should be the ruling of the court?

A. The court should overrule the objection. A's constitutional rights were not violated, as he was confronted with the witness and had his opportunity for cross-examination, even though he did not take advantage of it. Section 8 of the Code of Crim. Pro. provides in part as follows: "In a criminal action the defendant is entitled: 1. To a speedy and public trial; 2. To be allowed counsel as in civil actions, or he may appear and defend in person and with counsel; and 3. To produce witnesses in his behalf, and to be confronted with the witnesses against him in the presence of the court, except that (A) where the charge has been preliminarily examined before a magistrate, and the testimony reduced by him to the form of a deposition in the presence of the defendant, who has, either in person or by counsel, cross-examined, or had an opportunity to cross-examine the witness; . . . People v. Fish, 125 N. Y. 136; People v. Gilhooley, 108 App. Div. 234; People v. Vitusky, 155 App. Div. 139; People v. Qualey, 210 N. Y. 202.

Q. A was tried for robbery and duly convicted. Three days thereafter he appeared for sentence, and the judge, without asking him if he had anything to say why the judgment of the law should not be pronounced against him, sentenced him to state prison. Upon appeal, what should the decision be?

A. The judgment should be reversed as the sentence is invalid. Section 480 of the Code of Crim. Pro. provides as follows: "When the defendant appears for judgment, he must be asked by the clerk whether he have any legal cause to show why judgment should not be pronounced against him." *Messner v. People*, 45 N. Y. 1; *People v. McClure*, 148 N. Y. 95.

Q. A was being tried for burglary. At the end of the first day of the trial, the court adjourned for the following day. By reason of a train wreck, the judge and officers were unable to reach the court, and on the third day the trial was resumed without any objection from the defendant. He is duly con-

victed, and appeals on the ground that the court was not legally in session. What should be the decision on appeal?

A. The appeal should be dismissed. Although the proceedings were suspended by reason of the judge being unable to reach the court, yet the court did not lose jurisdiction of the case, and when the trial was resumed without objection from the defendant, the judgment of conviction stands. *People v. Sullivan*, 115 N. Y. 185.

Q. X was arrested and indicted for a misdemeanor. The case being on the calender, X's attorney appeared and requested an adjournment; the court refused his request and insisted upon him going to trial at once. X was not present. X's attorney objects to the trial proceeding in the absence of the defendant. The court overrules his objection, to which ruling he excepts. The case was tried and submitted to the jury which rendered a verdict of guilty. Will this verdict stand?

A. Yes. Section 356 of the Code of Crim. Pro. provides that: "If the indictment be for a misdemeanor, the trial may be had in the absence of the defendant, if he appear by counsel; but if the indictment be for a felony, the defendant must be personally present." See *People v. Welsh*, 88 App. Div. 65.

Q. A was indicted and tried for robbery. The case was duly submitted to the jury, and they having agreed upon a verdict, returned to the court room and rendered a verdict of guilty. The verdict was received and recorded. A was not present during all this time, but was in jail. He was then sent for and having waived the appointment of a time for sentence, was then and there sentenced to state's prison. Was the sentence valid?

A. The sentence should be set aside as it is absolutely void. In all felony cases, the defendant must, before the verdict

is received, appear in person. *People v. Perkins*, 1 Wend. 91. Section 434 of the Code of Crim. Pro. provides as follows: "If the indictment be for a felony, the defendant must, before the verdict is received, appear in person. If it be for a misdemeanor, the verdict may be rendered in his absence."

(NOTE.) In *People v. Wilson*, 109 N. Y. 345, a murder case, it was held: "That in the absence of anything indicating that the defendant was prejudiced thereby, the reception of the verdict when defendant's counsel was not present was not error requiring a reversal."

Q. A is on trial for murder. After all the evidence is in and the judge has charged the jury, the case is duly submitted to them. The jurors leave the court room and after having deliberated for a considerable time, they return and ask the court for further instructions as to the testimony. A is not present at this time. A's counsel objects to the instructions being given in A's absence, and insists that A be sent for at once. How should the court rule?

A. The objection must be sustained. The prisoner must be sent for and brought into court before the instructions can be given. "If after the jury have left the court room to consider the verdict, they return and ask certain questions as to the testimony, the court has no right to answer them, while the prisoner is absent; he is entitled to be personally present when any instruction is given to the jury having a tendency to influence the verdict." *Maurer v. People*, 43 N. Y. 1. Section 427 of the Code of Crim. Pro. provides that: "After the jury have retired for deliberation, if there be a disagreement between them, as to any part of the testimony, or if they desire to be informed of a point of law arising in the cause, they must require the officer to conduct them into court. Upon their being brought into court, the information required must be given after notice to the district attorney and to the counsel for the defendant, and in cases of felony, in the presence of the defendant."

Q. Upon a trial for murder, in examining jurors, it develops that A, one of the jurors, has already formed an opinion as to the guilt of the prisoner. What must the prosecuting attorney show in order to make the juror acceptable?

A. This case is governed by sec. 376 of the Code of Crim. Pro., which in part is as follows: "But the previous expression or formation of an opinion or impression in reference to the guilt or innocence of the defendant, or a present opinion or impression in reference thereto, is not a sufficient ground of challenge for actual bias, to any person otherwise legally qualified, if he declare on oath, that he believes that such opinion or impression will not influence his verdict, and that he can render an impartial verdict according to the evidence, and the court is satisfied, that he does not entertain such a present opinion or impression as would influence his verdict." The case of *People v. Flaherty*, 162 N. Y. 532, shows how strictly this section is construed. It was there held that: "A juror's declaration on oath, that he could render a fair and impartial verdict upon the evidence brought out on the trial, does not remove a prima facie disqualification arising from his testifying that he has an opinion as to the guilt or innocence of the accused where he does not declare on oath, as required by the statute, 'that he believes such opinion or impression will not influence his verdict.'" See also *People v. Miller*, 81 App. Div. 255; *People v. Wolter*, 203 N. Y. 484.

Q. You are the attorney for a defendant on trial for murder. One of your material witnesses refuses to attend. State what proceedings you would take to compel his attendance.

A. He can be compelled to attend by attachment. He is also guilty of a criminal contempt, or a misdemeanor. Section 600 of the Penal Law, also Code of Crim. Pro., secs. 611 to 619a, inclusive. Section 619 of the Code of Crim. Pro. provides that: "Disobedience to a subpoena, or a refusal to be sworn or to testify, may be punished by the court or magistrate, as for a criminal contempt in the manner provided in the judiciary law."

Q. A and B agree in New York City that they should go to Jersey City, N. J., and there fight a duel. Thereafter they fight a duel in Jersey City, and A is killed. What crime is B guilty of?

A. B is guilty of murder in the second degree, according to sec. 1047 of the Penal Law, which is as follows: "A person, who, by previous appointment made within the state, fights a duel without the state, and in so doing inflicts a wound upon his antagonist, whereof the person injured dies; or who engages or participates in such a duel, as a second or assistant to either party, is guilty of murder in the second degree, and may be indicted, tried and convicted in any county of this state."

Q. A was the holder of a check for \$500 which was raised from \$50, and A knew it. He negotiated the same in due course of business. What crime, if any, is A guilty of?

A. A is guilty of forgery. This is provided for in sec. 881 of the Penal Law as follows: "A person who, knowing the same to be forged or altered, and with intent to defraud, utters, offers, disposes of or puts off as true, or has in his possession, with intent to so utter, offer, dispose of, or put off: 1. A forged seal or plate, or any impression of either; or 2. A forged coin; or 3. A forged will, deed, certificate, indorsement, record, instrument or writing, or other thing, the false making, forging, or altering of which is punishable as forgery, is guilty of forgery in the same degree as if he had forged the same." *People v. Altman*, 147 N. Y. 473.

Q. A intending to commit a fraud on B, in the pretended sale and conveyance of a farm, induces C, his friend, who is a notary public, to willfully certify falsely that the execution of a deed of conveyance of the farm was acknowledged by D, the grantor named therein, before him. Of what crime, if any, can C be convicted?

A. C is guilty of forgery in the first degree, according to sec. 885 of the Penal Law which is as follows: "An officer au-

thorized to take the proof or acknowledgment of an instrument which by law may be recorded, who willfully certifies falsely that the execution of such an instrument was acknowledged by any party thereto, or that the execution of any such instrument was proved, is guilty of forgery in the first degree." See also *Marden v. Dorthy*, 160 N. Y. 55; *People v. Marrin*, 205 N. Y. 275.

Q. Can any crimes be compromised?

A. Certain crimes which are misdemeanors and for which the party injured has a remedy by civil action may be compromised. Section 663 of the Code of Crim. Pro., provides that: "When a defendant is brought before a magistrate, or is held to answer on a charge of a misdemeanor, for which the person injured by the act constituting the crime has a remedy by civil action, the crime may be compromised, as provided in the next section, except when it was committed: 1. By or upon an officer of justice while in the execution of the duties of his office; 2. Riotously; or 3. With an intent to commit a felony. Section 664 provides that: "If the party injured appear before the magistrate, or before the court to which the depositions and statements are required, by sec. 221, to be returned at any time before trial or commitment by the magistrate, or trial on indictment for the crime, and acknowledge in writing that he has received satisfaction for the injury, the magistrate or court may, in his or its discretion, on payment of the costs and expenses incurred, if such magistrate or court shall see fit so to direct, order the proceedings to be stayed upon the prosecution and the defendant be discharged therefrom. But in that case, the reason for the order must be set forth therein and entered upon the minutes." Section 665 provides that: "The order authorized by the last section is a bar to another prosecution for the same offense." Section 666 provides that: "No crime can be compromised, nor can any proceeding for the prosecution or punishment thereof upon a compromise, be stayed, except as provided in secs. 663 and 664."

CHAPTER IX

Domestic Relations

Q. A and B, husband and wife, who are living in a state of separation, execute a written agreement by which they mutually agree to live separate and apart, and the husband agrees to pay the wife \$200 per month for her support. He does not pay for three months, upon which B brings suit for \$600. Can she recover? Give reasons in full.

A. B can recover, such an agreement being valid, as sec. 51 of the Dom. Rel. Law (Consolidated Laws, chap. 14) gives the husband and wife the right to contract with each other, including the right to make a separation agreement, without the intervention of a trustee. "Prior to the legislation which gave married women general power to make contracts, it was the law that if a husband and wife had actually separated, a valid agreement might be made, through the medium of a trustee, for an allowance from the husband to the wife for her support. Under similar circumstances, agreements of that nature are still valid, but the intervention of a trustee or a third person is no longer necessary. In view of the legislation which permits husbands and wives to contract directly with each other, any contract for separation and support, which they formerly could have made by means of a trustee, they can now make without one." *Winter v. Winter*, 191 N. Y. 462; *Effray v. Effray*, 110 App. Div. 545; *McCormack v. McCormack*, 127 App. Div. 406.

(NOTE.) Where the husband and wife are living together, and they execute an agreement by which they agree to thereafter separate and live apart, and the husband agrees to pay the wife a certain sum for her support, this agreement is held to be void on the ground of public policy. It was so held in the case of *Poillon v. Poillon*, 49 App. Div. 341 (cited with approval in *Winter v. Winter*, supra), where it was held: "A separation agreement executed by husband and wife, without the intervention of a trustee, which

provides that the parties have mutually consented and agreed and 'by these presents do mutually consent and agree to hereafter live separate and apart from each other,' is void as against public policy, the necessary inference therefrom being, that the parties, neither of whom appeared to be entitled to a separation, were living together when the paper was signed, and that it was an essential part of the agreement that they should thereafter separate." *Maney v. Maney*, 119 App. Div. 765; *Matter of Kopf*, 73 Misc. 198.

Q. A husband agreed with his wife, they having separated, that he should pay her \$10 per week for her support. This was done, but \$10 was not enough and she went to a grocer who knew of the contract and purchased groceries. The grocer sues for the amount of the goods. What are his rights? Answer in full.

A. The grocer can recover from the husband. The question involved in this case has been the subject of much litigation. In *Hatch v. Leonard*, 38 App. Div. 128, it was held, that where a husband and wife are living separate and apart from each other, the presumption that the wife is the agent of the husband, authorized to charge him with purchases of necessities made by her, ceases. This decision was reversed by the court of appeals (*Hatch v. Leonard*, 165 N. Y. 435), and it was there held by the court, that the husband is bound to supply necessities even after separation, and that the implied agency to buy necessities does not cease after separation. This same case came up on another appeal (*Hatch v. Leonard*, 71 App. Div. 32), where it was held, if the husband had supplied the wife with a sufficient amount, he is discharged irrespective of the tradesman's knowledge. Of course in the question put, the husband not having supplied a sufficient sum, is liable. *Holihan v. Holihan*, 79 App. Div. 480.

Q. A, the wife of B, willfully deserted her husband and refused to live with him. The husband gave notice to C, a grocer, that he should not sell to the wife on his account. The grocer gave her all the goods necessary for her support, and upon the failure of the husband to pay for the same brings suit. Judgment for whom and why?

A. Judgment for the husband. While a husband is bound to supply his wife with necessities, yet when she voluntarily deserts him, he becomes relieved of this duty. As the grocer knew that the wife had left the husband and gave her the goods, he cannot hold the husband for their value. To entitle the wife to contract for necessities and charge the same to the husband, she must not voluntarily leave him. "A husband, whose wife abandons him without just cause and refuses his offer to support her if she will return to him, is not liable for necessities furnished to the wife while thus living apart from him. Semble, that a person who seeks to recover from a husband the value of necessities furnished to his wife, while she was living apart from him, must show that the separation was not due to the wife's fault." *Constable v. Rosener*, 82 App. Div. 155, affirmed in 178 N. Y. 507. See also *Ogle v. Der-shem*, 91 App. Div. 551; *Robinson v. Litz*, 123 N. Y. Suppl. 363.

Q. On March 1st, 1915, A and B desired to marry and become man and wife without the ceremony of a clergyman or of a duly authorized magistrate or public officer. Can this be done? If so, how? If not, why not?

A. Yes, providing that they comply with sec. 11, subdiv. 4, and sec. 25 of the Dom. Rel. Law, which are as follows: Sec. 11, subdiv. 4, reads: "A written contract of marriage signed by both parties and at least two witnesses who shall subscribe the same, stating the place of residence of each of the parties and witnesses and the date and place of marriage, and acknowledged by the parties and witnesses in the manner required for the acknowledgment of a conveyance of real estate to entitle the same to be recorded, provided, however, that all such contracts of marriage must in order to be valid be acknowledged before a judge of a court of record. Such contract shall be recorded within six months after its execution in the office of the clerk of the county in which the marriage was solemnized." Section 25 reads: "The provisions of this article pertaining to the granting of the licenses before marriage can be lawfully celebrated apply

to all persons who assume the marriage relation in accordance with subd. 4 of sec. 11 of this chapter."

Q. A and B, husband and wife, enter into a partnership. C loans money to the firm, and A being financially irresponsible, sues B for the amount. She defends on the ground that a husband and wife cannot enter into a partnership. Is the defense good? State your reasons.

A. The defense is not good. This question was settled by the case of *Suau v. Caffé*, 122 N. Y. 308, where it was said by Follet, Ch. J., in delivering the opinion of the court: "It being settled that a husband and wife may be the agents of each other, and that they may bind themselves by joint contracts entered into with third persons, they are liable as partners to the same effect. Where a husband and wife assume to carry on business as co-partners, and contract debts in the course of it, the wife cannot escape liability on the ground of coverture." Section 51 of the Dom. Rel. Law (Consolidated Laws, chap. 14) continues this rule and gives a husband and wife very complete power to contract with each other; this section is as follows: "A married woman has all the rights in respect to property, real or personal, and the acquisition, use, enjoyment and disposition thereof, and to make contracts in respect thereto with any person, including her husband, and to carry on any business, trade or occupation, and to exercise all powers and enjoy all rights in respect thereto and in respect to her contracts, and be liable on such contracts, as if she were unmarried; but a husband and wife cannot contract to alter or dissolve the marriage or relieve the husband from his liability to support his wife. All sums that may be recovered in actions or special proceedings by a married woman to recover damages to her person, estate or character shall be the separate property of the wife. Judgment for or against a married woman, may be rendered and enforced, in a court of record, or not of record, as if she was single. A married woman may confess a judgment specified in sec. one thousand two hundred and seventy-three of the Code of Civil Procedure."

Q. A, the wife of B, does certain work for the X Company which refuses to pay for the same. B, the husband, sues the company which defends on the ground that he is not the proper party to bring the suit, but that the wife herself should sue. Is the defense good?

A. The defense is good, the wife alone is the proper party to bring suit, unless it was expressly agreed that the husband should be entitled to the wife's earnings. This is provided for by sec. 60 of the Dom. Rel. Law as follows: "A married woman shall have a cause of action in her own sole and separate right for all wages, salary, profits, compensation or other remuneration for which she may render work, labor or services, or which may be derived from any trade, business or occupation carried on by her, and her husband shall have no right of action therefor unless she or he with her knowledge and consent has otherwise expressly agreed with the person obligated to pay such wages, salary, profits, compensation or other remuneration. In any action or proceeding in which a married woman or her husband shall seek to recover wages, salary, profits, compensation or other remuneration for which such married woman has rendered work, labor or services or which was derived from any trade, business or occupation carried on by her or in which the loss of such wages, salary, profits, compensation or other remuneration shall be an item of damage claimed by a married woman or her husband, the presumption of law in all such cases shall be that such married woman is alone entitled thereto, unless the contrary expressly appears." "The fact that a married woman enters upon an independent employment without protest or interference from her husband, shows a sufficient election on her part to labor on her own account, and thereby entitle herself to her earnings. The plaintiff was under no obligation, so far as her husband was concerned, to enter into any contract, express or implied, to serve a person outside of his house and to whom he was under no obligation; she having done so, the statute permits her to collect and retain her earnings in such employment." *Stevens v. Cunningham*, 181 N. Y. 459.

Q. A, an invalid, boarded with B who maintained and paid all expenses of the house. The wife of B nursed and took care of A while attending to her household duties, and while engaged in no other occupation. The nursing was done with the knowledge and consent of B, the husband. The services rendered by the wife of B were reasonably worth \$300. B brings suit to recover \$300, the wife making no claim therefor. Can the action be maintained? If so, why so? If not, why not? Answer in full.

A. Yes, the husband can maintain the action. "The legislation in this state upon the subject of the rights of married women has only resulted in abrogating their common-law status to the extent set forth in the various statutes. They have not by express provision, nor have they by implication, deprived the husband of his common-law right to avail himself of a profit or benefit from her services." *Porter v. Dunn*, 131 N. Y. 317. See also *Holcomb v. Harris*, 166 N. Y. 257.

Q. A, the wife of B, works for her husband in his place of business for ten weeks at \$10 per week. B refuses to pay her. She sues for the amount due. B defends on the ground that the contract is void, and even if it was valid her earnings belong to him. Is the defense good? Can she recover?

A. No. By virtue of the marital relation the husband was absolutely entitled to the services of the wife without paying for the same. "The provisions of the act in relation to married women (Laws of 1860 and 1884) making the property a married woman acquires, her separate property, does not apply to labor performed by her for her husband, and she cannot make a binding contract with him for her services, although the same are to be rendered outside of her household duties. While he cannot require her to perform services for him outside of the household, such services as she does render, whether within or without the strict line of her duty, belong to him, and a promise to pay therefor is simply a promise to make her a gift, and so is not enforceable." *Blaechinska v. Howard Mission*,

130 N. Y. 497. "It is very obvious that these enactments do not destroy the common-law unity of the marital relation. The husband is still entitled to the services of his wife." *Carver v. Wagner*, 51 App. Div. 50.

(NOTE.) The distinction must be drawn between the case where the wife works for a third person and where she works for her husband. When she works for the third person it is on her sole and separate account, providing of course that the work is outside of the household duties, and is in an occupation separate from that devolving upon her as wife, and the statute protects her contract. However, when she works for her husband it is on his account and the statute does not apply. *Stevens v. Cunningham*, 181 N. Y. 454.

Q. A committed an assault and battery upon B, his wife, whereby she became injured for life. B, the wife, brings action against A to recover damages for the injuries sustained. Can the action be maintained? State your reasons.

A. No. "The action is brought by a wife against her husband to recover damages for an assault and battery committed by the husband upon the wife. It is settled by authority that the action cannot be maintained. *Schultz v. Schultz*, 89 N. Y. 644. There is nothing in the Domestic Relations Act (Laws 1896) which works any change in the law in this respect. The Domestic Relations Act simply gives her a 'right of action for an injury to her person.' The claim which seeks to authorize the action based upon the language 'for an injury arising out of the marital relation' must fail. In no sense does an assault and battery arise out of the marital relation." *Abbe v. Abbe*, 22 App. Div. 484.

Q. By antenuptial contract, a wife gives her husband \$10,000. At that time she has \$25,000. After the marriage, the creditors of the wife before the marriage sue the husband for a claim of \$15,000 which they had against the wife. Can the creditors collect? If so, how much?

A. The creditors can collect \$10,000, according to sec. 54 of the Dom. Rel. Law (Consolidated Laws, chap. 14), which

is as follows: "A husband who acquires property of his wife by antenuptial contract or otherwise, is liable for her debts, contracted before marriage, but only to the extent of the property so acquired."

Q. A and B are husband and wife and are living together. The wife goes to a grocer and purchases groceries, agreeing to be individually liable therefor. The wife refuses to pay. The grocer sues the husband for the amount of the bill. Can he recover? Answer in full.

A. No. The rule is well settled that where a tradesman furnishes goods to the wife and gives her credit, upon her promise to pay for the same, the husband is not liable, even where the goods were purchased for the benefit of the whole family including the husband. *Tiemeyer v. Turnquist*, 85 N. Y. 516; *Jones v. Fleming*, 104 N. Y. 433. "When a married woman makes express contracts in her name for her necessary support, she will not be deemed to have acted as agent for her husband in procuring such support, nor is there any implied agreement on the part of her husband to pay for such necessities. When a person makes an express contract with a married woman for the joint support of herself and husband, if the wife is the sole contracting party, and the credit is given to her alone, and she is in all respects competent to make a valid contract and bind herself, such person will not be permitted to shift the liability upon the husband who is not a party to the contract, upon the failure of the wife to pay the amount due thereunder." *Byrnes v. Rayner*, 84 Hun, 199. Section 55 of the Dom. Rel. Law (Consolidated Laws, chap. 14) accords with this rule, and is as follows: "A contract made by a married woman does not bind her husband or his property."

(NOTE.) The general rule is that where a wife purchases necessities for the use of the family, the presumption is that she acts as the agent of the husband and he is liable. *Lindholm v. Kane*, 92 Hun, 369. This presumption may be overcome by the fact that credit was given to the wife personally. *Ehrich v. Bucki*, 7 Misc. 118; *Edwards v. Woods*, 131 N. Y. 350.

Q. A, the wife of B, goes to a butcher and purchases some meat for the use of the household. B also goes and makes purchases of meat at various times. All the purchases are charged to B. B fails to pay. The butcher sues the wife. Can he recover?

A. No. "A wife living with her husband is not liable for goods purchased in part by her and in part by him for use in their family, where she does not agree to become personally responsible for the indebtedness, and the goods are charged to the husband at the time of the purchase." *Bradt v. Schull*, 46 App. Div. 347.

Q. A allowed his wife \$15 per week for the use of the household. The wife saved from this allowance the sum of \$200 which she used to purchase a piano. Upon an execution of a judgment obtained against the wife, the sheriff levies upon the piano and sells the same. The husband consults you. Advise him.

A. The execution and sale of the piano was void, and the husband has a right of action against the sheriff. The money which the wife saved belonged to the husband, and likewise the property which she purchased with that money belonged to him. "In the management of the household the wife is the agent of the husband, and any surplus arising out of the economy of the wife, in her conduct and management of the household, remains and is the property of the husband, unless bestowed upon the wife as a gift." *Aaronson v. McCauley*, 46 State Rep. 564.

Q. A, the wife of B, in his presence grossly slanders C. C sues B, the husband. Can he recover? State your reasons.

A. No. To entitle C to recover, he must show that the slander was committed by the wife through the husband's actual coercion or instigation. This is provided by sec. 57 of the Dom. Rel. Law as follows: "A married woman has a right of action for an injury to her person, property or char-

acter or for an injury arising out of the marital relation, as if unmarried. She is liable for her wrongful or tortious acts; her husband is not liable for such acts unless they were done by his actual coercion or instigation; and such coercion or instigation shall not be presumed, but must be proved."

Q. A, the wife of B, sets a dog upon C in B's presence. The dog belongs to B. C sues both the husband and wife. B defends on the ground that he is not a necessary or proper party. Judgment for whom and why?

A. Judgment for B. "Under the Dom. Rel. Law, a husband is not liable for the wrongful acts of his wife, in setting upon another a dog owned by the husband, in the absence of proof that her conduct was the result of his actual coercion or instigation." *Strubing v. Mahar*, 46 App. Div. 400; *Quilty v. Battie*, 135 N. Y. 201. That the husband is not a necessary or proper party, sec. 450 of the Code of Civ. Pro. provides as follows: "In an action or special proceeding a married woman appears, prosecutes or defends alone or joined with other parties as if she was single. It is not necessary or proper to join her husband with her as a party in any action or special proceeding to recover damages to the person, estate or character of his wife. The husband is not a necessary or proper party to an action or special proceeding to recover damages to the person, estate or character of another on account of the wrongful acts of his wife committed without his instigation."

Q. A is sentenced to imprisonment for life. He serves six years and is then pardoned. He had previously been married and had two children born to him. On regaining his liberty, he seeks to secure the guardianship of his children and also to resume the marital relation with his wife. He comes to you for advice. What are his rights?

A. He cannot secure the guardianship of his children or resume the marital relation, for sec. 58 of the Dom. Rel. Law provides that: "A pardon granted to a person sentenced to imprisonment for life within this state does not restore that

person to the rights of a previous marriage, or to the guardianship of a child, the issue of such a marriage."

Q. A and B, husband and wife, are living in a state of separation, but no decree of divorce has been made by a court affecting their marriage. B has possession of the two children, the issue of the marriage, both of whom are minors, and the husband wishes to get control of them. He comes to you for advice. What are his rights, and how would you proceed to enforce them?

A. Apply to the supreme court for a writ of habeas corpus, according to sec. 70 of the Dom. Rel. Law, which is as follows: "A husband or wife, being an inhabitant of this state, living in a state of separation, without being divorced, who has a minor child, may apply to the supreme court, for a writ of habeas corpus to have such minor child brought before such court; and on the return thereof, the court, on due consideration, may award the charge and custody of such child to either parent for such time, under such regulations and restrictions, and with such provisions and directions, as the case may require, and may at any time thereafter vacate or modify such order."

Q. A question has arisen upon the return of a writ of habeas corpus, as to the proper person to have the custody of a child five years old. The father claims it as a matter of right, and it is not contended that he is a person unfit to take charge of it. Upon what consideration should the court decide the question, and what circumstances should control as to the disposition of the child?

A. The only consideration is, what is the best interest of the child? As a general rule, the father is entitled to the custody of the infant, all other facts being equal. *Mercein v. People*, 25 Wend. 64. "It is the well-settled law of this state, that in determining the custody of infants, between father and mother, their welfare, and not the supposed rights of the parents is the controlling principle." *Perry v. Perry*, 17 Misc. 28; *People ex rel. Pruyne v. Walts*, 122 N. Y. 238. The law

awards the custody of the child to the father unless the welfare of the child is better served by awarding it to the mother. *People v. Sinclair*, 91 App. Div. 322.

Q. A, the father of B, an infant, meets C in the street. A tells C who had employed B without the consent of A, not to pay wages to B, but to himself, A. At the end of a month, C pays the wages to B. A sues C to recover the same amount again. Judgment for whom and why?

A. Judgment for C. The notice in order to be binding on the employer must be in writing, and served within thirty days after the commencement of such service, according to sec. 72 of the Dom. Rel. law (Consolidated Laws, chap. 14), which is as follows: "Where a minor is in the employment of a person other than his parent or guardian, payment to such minor of his wages is valid, unless such parent or guardian notify the employer in writing, within thirty days after the commencement of such service, that such wages are claimed by such parent or guardian, but whenever such notice is given at any time payments to the minor shall not be valid for services rendered thereafter."

Q. A, the son of B, works for C for six months. At the expiration of this time, the father learning of the employment, serves notice in writing on the employer, instructing him not to pay any more wages to the son. C does not heed the notice and pays the wages as before. The parent subsequently brings suit for the wages that accrued after the serving of the notice. C defends, claiming that the notice was not served in time. Judgment for whom and why?

A. Judgment for the parent. "It was not the purpose of the legislature to prevent a parent from collecting the wages of a minor child, if he failed to give notice within the time specified (thirty days). Subsequent notice would enable him to collect the infant's future earnings, but would not affect prior payments." *McClurg v. McKercher*, 40 State Rep. 603.

(NOTE.) Where the father of a minor child who resides with his parents, neglects to serve upon the child's employers a notice that he claims the child's wages, the title to such wages vests in the child; and when the child pays the wages to his mother, the latter obtains a valid title thereto. The father of a minor obtains no title to money acquired by a minor in the purchase and sale of property at a profit. *Watson v. Kemp*, 42 App. Div. 372.

Q. A comes to you and says that he wishes to adopt B, the child of C, who was thirteen years of age. Both of B's parents are living. What steps would you take to secure the adoption of the child in a legal manner?

A. It is necessary to secure the consent of the child, and the consent of the child's parents. This practice is governed by sec. 111 of the Dom. Rel. Law (Consolidated Laws, chap. 14), which is as follows: "Consent to adoption is necessary as follows: 1. Of the minor, if over twelve years of age. 2. Of the foster parent's husband or wife, unless lawfully separated, or unless they jointly adopt such minor. 3. Of the parents or surviving parent of a legitimate child, and of the mother of an illegitimate child; but the consent of a parent who has abandoned the child, or is deprived of civil rights, or divorced because of his or her adultery or cruelty, or adjudged to be insane or to be an habitual drunkard, or judicially deprived of the custody of the child on account of cruelty or neglect, is unnecessary. 4. Of a person of full age having lawful custody of the child, if any such person can be found, where the child has no father or mother living or no father or mother whose consent is necessary under the last subdivision. If such child has no father or mother living, and no person can be found who has the lawful custody of the child, the judge or surrogate shall recite such facts in the order allowing the adoption." Section 112 deals with the requisites necessary for voluntary adoption.

Q. A minor child was legally adopted by A and B, husband and wife. What are the rights and duties of the child with regard to its foster parents and its natural parents? From whom does it inherit, and to what extent?

A. This question is fully answered by sec. 114 of the Dom. Rel. Law, which is as follows: "Thereafter the parents of the

minor are relieved from all parental duties toward, and of all responsibility for, and have no rights over such child, or to his property by descent or succession. Where a parent who has secured a divorce, or a surviving parent, having lawful custody of a child, lawfully marries again, or where an adult unmarried person who has become a foster parent and has lawful custody of a child, marries, and such parent or foster parent consents that the person who thus becomes the stepfather or stepmother of such child may adopt such child, such parent or such foster parent, so consenting, shall not be thereby relieved of any of his or her parental duties toward, or be deprived of any of his or her rights over said child, or to his property by descent or succession. The child takes the name of the foster parent. His rights of inheritance and succession from his natural parents remain unaffected by such adoption. The foster parent or parents and the minor sustain toward each other the legal relation of parent and child, and have all the rights and are subject to all the duties of that relation, including the right of inheritance from each other, except as the same is affected by the provisions in this section in relation to adoption by a stepfather or stepmother, and such right of inheritance extends to the heirs and next of kin of the minor, and such heirs and next of kin shall be the same as if he were the legitimate child of the person adopting, but as respects the passing and limitation over of real or personal property dependent under the provisions of any instrument on the foster parent dying without heirs, the minor is not deemed the child of the foster parent so as to defeat the rights of the remaindermen."

Q. A, a female eighteen years of age, who is under the guardianship of B, marries C. A's estate in the hands of B amounts to \$10,000. She now consults you as to her legal status. Advise her.

A. The guardianship over the person ceases with the marriage of the female, but the guardianship over her property continues during her minority. Section 84 of the Dom. Rel. Law.

Q. A minor for whom a general guardian has not been appointed acquires real property. State the rule as to the several persons in the order, to whom the guardianship of his property, with the rights, powers and duties of a guardian in socage belongs.

A. Section 80 of the Dom. Rel. Law provides as follows: "Where a minor for whom a general guardian of the property has not been appointed shall acquire real property, the guardianship of his property with the rights, powers and duties of a guardian in socage belongs: 1. To the father. 2. If there be no father, to the mother. 3. If there be no father or mother, to the nearest and eldest relative of full age, not under any legal incapacity; and as between relatives of the same degree of consanguinity, males shall be preferred. The rights and authority of every such guardian shall be superseded by a testamentary or other guardian appointed in pursuance of this article."

Q. A, the general guardian of B, spent the sum of \$1,000 of his (A's) own money, without an order of the court, in improving certain property belonging to B. B, upon coming of age, sells the property. A demands the \$1,000, and upon the refusal of B to pay the same, brings action against him. Judgment for whom and why?

A. Judgment for B. "As a general rule, a guardian is not authorized to dispose of the property or expend money on behalf of his ward, except for his maintenance and education, without the order of a court of equity. Where a guardian advances money out of his own pocket, for the erection of buildings upon the land of his ward, without the order of a court of equity, he cannot recover the amount from his ward." *Hassard v. Rowe*, 11 Barb. 22. See also *Copley v. Oneil*, 57 Barb. 299; *Hickey v. Dixon*, 42 Misc. 4. Section 83 of the Dom. Rel. Law has not changed this rule.

Q. A, the general guardian of B, an infant, by carelessness and negligence, permits a waste of \$1,000 on the property of B. What relief, if any, has B?

A. A loses the guardianship of B, and shall forfeit to the ward treble damages. Section 83 of the Dom. Rel. Law.

Q. A, whose wife has been granted a divorce against him for his infidelity in this state, promises to marry B, an unmarried female. He subsequently refuses to do so, and B sues him for breach of promise. Can the action be maintained? Give your reasons.

A. The action cannot be maintained if B knew of A's former marriage and divorce. Otherwise if she was ignorant of the facts. *Haviland v. Halstead*, 34 N. Y. 643. "An action may be maintained upon a married man's breach of contract to marry, provided that the contract was entered into by the woman in ignorance of the promisor's existing marriage." *Cammerer v. Muller*, 14 N. Y. Suppl. 511. In that case, Van Brunt, J., says: "We are cited to the case of *Haviland v. Halstead*, 34 N. Y. 643, but it expressly appeared in that case that the plaintiff knew of the condition of the defendant, and consequently a recovery could not be had; and our attention has been called to no case holding that, because one party enters innocently into a contract, and the other is incapacitated from fulfilling it, and has entered into the contract with fraudulent intent the innocent party has no remedy. Such a rule would be offering a premium upon villainy. It cannot be that where a man induces a woman to enter into a promise of marriage, she knowing of no disability, that she cannot recover damages for the breach of such contract, if it turns out that he is incapable of fulfilling it." This case was affirmed by the Court of Appeals in 133 N. Y. 623. See also *Blattmacher v. Saal*, 29 Barb. 22; *Kerns v. Hagenbuehle*, 17 N. Y. Suppl. 367. In the last two cases cited a recovery was allowed on the ground that the defendant impliedly promised that there was no impediment to his performing his promise.

Q. A young lady nineteen years of age, brings an action against a man of full age for breach of promise to marry. About the same time, she herself is sued for breach of promise of

marriage by another man, also of full age. Will either action lie? If so, which one?

A. Her action will lie, while the action against her will not. "The contract to marry by an infant is not void; but voidable at the election of the infant; yet as to persons of full age contracting with the infant it absolutely binds; hence an infant may maintain this action against an adult, but an adult not against an infant." *Hunt v. Peake*, 5 Cowen, 475; *Hamilton v. Lomax*, 26 Barb. 615; *Fiebel v. Obersky*, 13 Abb. Pr. (N. S.) 403; *Leichtweiss v. Treskow*, 21 Hun, 487.

Q. Your client married a woman believing her to be chaste. There was no fraud on the part of the woman except concealment. It turned out that the woman was a notorious prostitute, a fact which, if your client had known it, would have prevented his marriage with her. He consults you. What are his rights in the premises, and what remedy would you pursue for him under the circumstances?

A. He has no remedy; the marriage cannot be annulled. "The fact concealed from the husband that the wife before marriage had been a prostitute, and also had given birth to an illegitimate child, does not in itself constitute such fraud as will authorize an annulment of the marriage, for antenuptial unchastity is no ground for annulment." *Shrady v. Logan*, 17 Misc. 329.

(NOTE.) "A marriage although consummated will be annulled for fraud where the woman on inquiry of her intended husband stated that she had been the wife of a man then deceased and that he was the father of her child, when in truth she had been his mistress and the child was a bastard, and the plaintiff did not cohabit with her after the discovery of the fraud. It is true that such misrepresentation does not go to the essentials of the marriage contract, as prior chastity is not a necessary qualification for marriage, but chastity if insisted upon, may be made an essential qualification. Such misrepresentations may be grounds for an annulment of the marriage for fraud, because as a matter of law it may be material upon the question of consent, which is essential to the contract of marriage." *Domschke v. Domschke*, 138 App. Div. 454. "The free and full consent, which is of the essence of all ordinary contracts, is expressly made by the statute necessary

to the validity of the marriage contract. The minds of the parties must meet in one intention. It is a general rule that every misrepresentation of a material fact, made with the intention to induce another to enter into an agreement and without which he would not have done so, justifies the court in vacating the agreement. It is obvious that no one would obligate himself by a contract, if he knew that a material representation, entering into the reason for his consent, was untrue. There is no valid reason for excepting the marriage contract from the general rule. If the plaintiff proves to the satisfaction of the court that, through misrepresentation of some fact, which was an essential element in the giving of his consent to the contract of marriage and which was of such a nature as to deceive an ordinarily prudent person, he has been victimized, the court is empowered to annul the marriage." Gray, J., in *DiLorenzo v. DiLorenzo*, 174 N. Y. 467.

Q. A brings an action against B, his wife, for divorce on the ground of adultery, and the only evidence he has is a written confession of her adultery with C. Will judgment be given him? Answer fully.

A. No. He must have some corroboration of the confession. "A judgment for absolute divorce will not be granted on the confession of the defendant alone; and in order to justify such a judgment upon a confession, there must be such corroboration of the confession as will remove all just suspicion of collusion." *Fowler v. Fowler*, 29 Misc. 670. "To justify the court in awarding a judgment of absolute divorce upon the confession of the party charged with adultery, the circumstances attending such confession must be shown to be of a character that precludes all suspicion of collusion, and as a rule such confession should be corroborated by other proof." *Diederichs v. Diederichs*, 44 Misc. 591. See also *Lyon v. Lyon*, 62 Barb. 138; *Madge v. Madge*, 42 Hun, 525.

Q. A girl sixteen years of age, while living with her parents, marries B, who is twenty years of age, without the consent of her parents. The father of the girl brings an action against B to annul the marriage. B demurs on the ground that: 1. The complaint does not state facts sufficient to constitute a cause of action, and 2. That the father is not the proper party plaintiff. What is your opinion on each of these points? Is the

defense good? Suppose B had brought the action on the ground that the girl was only sixteen years of age at the time of the marriage. Could the action be maintained?

A. B's demurrer should be overruled, for the age of consent is eighteen years for females as well as males under sec. 7 of the Dom. Rel. Law, and the father is the proper party to maintain the action under sec. 1744 of the Code of Civil Procedure, which latter section prohibits B from bringing the action as he was above the age of legal consent. Section 1744 of the Code is as follows: "An action to annul a marriage, on the ground that one of the parties had not attained the age of legal consent, may be maintained by the infant, or by either parent of the infant, or by the guardian of the infant's person; or the court may allow the action to be maintained by any person, as the next friend of the infant. But a marriage shall not be annulled, at the suit of a party who was of the age of legal consent when it was contracted, or where it appears, for any time after they attained that age, freely cohabited as husband and wife."

Q. A brings an action against his wife, charging her with having committed adultery with B. B is innocent and he consults you with reference to defending his reputation in the matter. What would be your advice?

A. B can at any time before the entry of judgment, appear either in person or by attorney, and demand of A's attorney a copy of the summons and complaint, and defend the action in so far as the issues affect him. This is allowed by sec. 1757 of the Code of Civ. Pro.

Q. A, the wife of B, absented herself for seven years, and B, believing her to be dead, married C with whom he had a child. A then returns. What is the effect of the second marriage, and is the issue of that marriage legitimate? Is the wife of the second marriage entitled to dower in B's real estate?

A. The marriage of B with C is voidable merely, according to sec. 7 of the Dom. Rel. Law. It is void from the time its

nullity is declared by a court of competent jurisdiction. The issue of the second marriage are deemed for all purposes the legitimate children of the parent who at the time of the marriage was competent to contract, and are entitled to succeed as such in the same manner as other legitimate children, to the real and personal estate of said parent. Section 1745 of the Code of Civ. Pro. If the second marriage is annulled, then C is not entitled to dower in B's real estate. *Price v. Price*, 124 N. Y. 589.

Q. A is a child begotten out of ~~an~~ lawful wedlock between B and C. Thereafter B and C intermarry. B dies intestate, and A claims to be entitled to share in the distribution of the estate of B. This is opposed by the parents of B on the ground that A is not the legitimate child of B. What do you say?

A. The intermarriage of B and C had the effect of legitimizing A, and he was entitled to share in the estate of B as though he was born after the marriage of B and C. Section 24 of the Dom. Rel. Law so provides.

(NOTE.) It is also provided by sec. 24 that "An estate or interest vested or trust created before the marriage of the parents of such child (illegitimate) shall not be divested or affected by reason of such child being legitimized."

Q. A and B, husband and wife, are living in a state of separation. There is one child living with A. A in his will leaves directions for C to act as guardian of the said child. B, the mother, is not an unfit person to take charge of the child. What do you say as to the validity of the direction in A's will?

A. The direction is invalid; the right of the surviving parent to the guardianship of the children cannot be affected by any testamentary directions of the decedent. This is provided for by sec. 81 of the Dom. Rel. Law, which is as follows: "A married woman is the joint guardian of her children with her husband, with equal powers, rights and duties in regard to them. Upon the death of either father or mother, the surviving parent, whether of full age or a minor, of a child likely to be born, or of any living child under the age of twenty-one years and unmarried, may, by deed or last will, duly executed, dispose of

the custody and tuition of such child during its minority or for any less time, to any person or persons. Either the father or the mother may in the lifetime of them both, by last will duly executed, appoint the other the guardian of the person and property of such child, during its minority. A person appointed guardian in pursuance of this section shall not exercise the power or authority thereof unless such will is admitted to probate, or such deed executed and recorded as provided by sec. twenty-eight hundred and fifty-one of the Code of Civil Procedure." "Under the Statute (now Dom. Rel. Law, sec. 81), the surviving parent has the sole right to appoint the testamentary guardian of a child, and his or her right to the custody of the child is absolute, provided such parent be a fit person." *People ex rel. Byrne v. Brugman*, 3 App. Div. 155.

Q. The defendant B is the father of the plaintiff A. When the plaintiff was sixteen years old, the defendant persuaded her to remain at home and work for him promising to pay her for the work done. Plaintiff who has just become of age demands the money, which is refused. She brings this suit for the amount. Defendant concedes the fact as stated, admits that plaintiff performed the work, but claims that she was bound to do so. What are the rights of the parties and why?

A. The plaintiff cannot recover, as the defendant's promise was gratuitous. A father is entitled to the services of his minor daughter until she attains the age of twenty-one years. As to such services, there was no consideration for the defendant's promise. *Bolton v. Terpenney*, 14 Weekly Dig. 533; *Lind v. Sullestadt*, 21 Hun, 364; *Otis v. Hall*, 117 N. Y. 131. Of course if the infant is emancipated, a different rule prevails, for then as said by Earl, J., in *Kain v. Larkin*, 131 N. Y. 300: "It is the undoubted rule of law in this state, that a father may emancipate his minor child even by parol, and after such emancipation may make contracts with him, and become liable to pay him for wages."

Q. A man is sued for necessities furnished to his son by a stranger. Plaintiff proves that the infant was without neces-

sary clothing, and that the clothing furnished by him to the infant was not unfitted to the infant's station in life. Plaintiff now rests, and asks for judgment on the facts proved. What should the judgment be?

A. Judgment for the defendant. The plaintiff in addition to the facts proved, should have shown that the father refused or neglected to furnish the necessary clothing. "Inasmuch as a parent is under a natural obligation to furnish necessities for his infant children, if the parent neglect the duty, any person who supplies such necessities is deemed to have conferred a benefit on the delinquent parent, for which the law raises an implied promise on the part of the parent to pay; but in order to authorize any person to act for the parent in such a case, there must be a clear and palpable omission of duty in that respect on the part of the parent." *Van Valkenberg v. Watson*, 13 Johns. 430; *Gray v. Sands*, 66 App. Div. 572.

Q. An infant who is living with his parent buys certain clothing from a merchant. The clothing was necessary and suitable to the station in life of the infant. The goods were sold to the infant without the consent of the father. Can the merchant recover from the infant?

A. No. An infant who resides at home under the care of a parent, and is supported by him, cannot bind himself for necessities. *Wailing v. Toll*, 9 Johns. 141; *Murphy v. Holmes*, 87 App. Div. 366. "An infant is only liable for necessities when he has no other means of obtaining them except by a pledge of his personal credit. If an infant is under the care of a guardian or parent who has the means and is willing to furnish what is actually necessary, he cannot, without the consent of such parent or guardian, make a binding contract for articles which under other circumstances would be necessities." *Kline v. L'Amoureux*, 2 Paige, 419.

Q. An infant living apart from his father contracts certain debts for board and lodging. On his failure to pay he is sued, and interposes the defense of infancy. The creditor proves the

debt, and then rests his case. Can he recover against the infant?

A. No. He must show that the father failed or refused to provide for the infant. "A father is bound by law to support his minor child, and board and lodging furnished by a third party to the child, in the absence of proof that the father has not the ability, or refuses to support him, do not constitute necessities within the rule which renders an infant liable therefor." *Goodman v. Alexander*, 28 App. Div. 227. This case was reversed by the court of appeals, but merely on a technical question of pleading. The rule of substantive law laid down by the appellate division was not questioned, as will be seen from the opinion of Parker, Ch. J. (*Goodman v. Alexander*, 165 N. Y. 289), which in part is as follows: "That the obligation rests upon a father or other person standing in loco parentis, who has the ability to do so, to support his infant children even though they have an estate of their own, and that therefore one who furnishes board and lodging to infants so situated, cannot recover against them is well settled law."

Q. A young man on his twentieth birthday, his father consenting, entered into a contract in writing with a merchant, to work as a clerk two years for the sum of \$720, being at the rate of \$30 a month, which was all that his services were reasonably worth. At the end of the third month, the clerk quit work, refusing to perform his contract. The clerk claims the salary agreed upon from the merchant for the time he worked; the merchant claims damages by way of recoupment for the avoidance of the contract. State fully the legal rights and remedies of the parties. Give your reasons.

A. The infant can recover for the services actually rendered. The merchant cannot recover damages by way of recoupment. Where a party enters into a contract, and having performed part of it, without the consent of the master, voluntarily abandons further performance of it, he cannot maintain an action for the labor actually performed; as the contract is entire, a full

performance is necessary to plaintiff's right of action, and is a condition precedent. *Jennings v. Camp*, 13 Johns. 94. The case of infants is an exception to this rule. "In an action by an infant to recover for work and labor, it is neither a defense nor a ground for reducing the damages, that the work was done under a contract by the infant to labor for the defendant for a fixed period of time, which he violated by leaving the defendant's employ without cause before the time expired." *Whitmarsh v. Hall*, 3 Denio, 375; *Streaser v. Buch*, 62 Hun, 298; *Aborn v. Janis*, 62 Misc. 95.

Q. A, an infant, buys goods of B, at the same time representing that he is of full age. B sues for the purchase price of the goods. A sets up infancy as a defense. Judgment for whom and why?

A. Judgment for A. The fraud did not charge the infant with a legal liability on the contract of purchase, and as B seeks to enforce the contract, not to recover damages resulting from the fraud, he is not entitled to recover. *Studwell v. Shapter*, 54 N. Y. 249. "It is well settled in this state that in an action upon a contract made by an infant he is not estopped from pleading his infancy by any representation as to his age made by him to induce another person to contract with him." *International Text Book Co. v. Connelly*, 206 N. Y. 197.

(NOTE.) "For his torts generally, where they have no basis in any contract relation, an infant is liable just as any other person would be; but the doctrine is equally well settled that a matter arising *ex contractu*, though infected with fraud, cannot be changed into a tort, in order to charge the infant by a change of the remedy; a fraudulent act, to render the infant chargeable therewith must be wholly tortious. If the action is substantially grounded in contract he is not liable. The test of an action against an infant is whether a liability can be made out without taking notice of the contract." *Bartlett, J.*, in *Collins v. Gifford*, 203 N. Y. 468.

Q. A, an infant eighteen years of age, conveys certain real estate to B, his father. He spends the money received from

the sale, and on coming of age demands the property. Was the conveyance valid? What are the rights of the parties?

A. The conveyance is voidable at the election of the infant, who can recover the property without restoring the consideration. "Where a son during infancy conveys real estate to his father, receiving and expending or wasting the consideration therefor, before his arrival at full age, and has no other property with which to replace it, he may disaffirm his deed after he arrives at full age, without restoring or offering to restore the consideration. Mere acquiescence by the son, without any affirmative act for three years after his arrival at full age, is not a ratification of the conveyance." *Green v. Green*, 69 N. Y. 553.

(NOTE.) In *Kane v. Kane*, 13 App. Div. 544, an infant mortgaged his lands, received and squandered the money. After he became of age he disaffirmed the mortgages, and it was held that they were not a lien on the infant's land, and that the restitution of the consideration of the mortgages was not a necessary condition precedent to the effectual disaffirmance of them. In *Eagan v. Scully*, 29 App. Div. 617, *aff'd* in 173 N. Y. 581, it was said: "It is a general rule that a conveyance by an infant is valid until it is avoided by him after arriving at full age, and that he is entitled to exercise his right of avoidance at any time within the term of the Statute of Limitations after his majority. It has been held that mere delay in taking advantage of this privilege will not work a waiver or a ratification, and that ratification is a matter of intention and will not be inferred by a bare recognition or a silent acquiescence in it, for any time less than the period of statutory limitation." See also *O'Donohue v. Smith*, 130 App. Div. 214.

Q. A is the father of B, a daughter and only child who is married to C. B has no property or means of any kind. C is very wealthy and refuses to support or assist A who is unable to work and is without any means of support. Can A compel C to assist and contribute towards his support?

A. No. While a child or grandchild is bound to support an indigent parent or grandparent, a son-in-law is not. The statute has reference to natural relatives only. *Ex parte Hunt*, 5 Cow. 284. See secs. 914 to 926, inclusive, of the Code of Criminal Procedure.

Q. A, the wife of B, takes out a policy of insurance on the life of B for \$10,000, the annual premium therefor being \$1,000, which was paid for by the husband out of his own property. B died leaving no property but debts to the amount of \$10,000. Who is entitled to the \$10,000 due from the insurance company on the policy?

A. The wife is entitled to \$5,000, being the amount of insurance purchasable for \$500, and the creditors are entitled to \$5,000, being the amount of insurance purchasable in excess of \$500 premium. This is provided for in sec. 52 of the Dom. Rel. Law as follows: "A married woman may, in her own name, or in the name of a third person, with his consent, as her trustee, cause the life of her husband to be insured for a definite period, or for the term of his natural life. Where a married woman survives such period or term she is entitled to receive the insurance money, payable by the terms of the policy, as her separate property, and free from any claim or representative of her husband, except, where the premium actually paid annually out of the husband's property, exceeds five hundred dollars, that portion of the insurance money which is purchased by excess of premium above five hundred dollars, is primarily liable for the husband's debts."

CHAPTER X

Equity

Q. State three maxims of equity, and give a state of fact wherein one of them will apply.

A. "He who seeks equity must do equity." "Equity considers that as done which ought to have been done." "He who comes into equity, must do so with clean hands." An example is: Where one, on the due day of a mortgage, has tendered the amount of the mortgage to the mortgagee, and the latter has refused the same, if the mortgagor then goes into equity asking that the mortgage be canceled of record, he cannot obtain relief unless he keeps the tender good. Now while it is not necessary that you continue a tender in force for the purpose of removing the lien of the mortgage, yet if you desire affirmative relief in equity as you do in this case, where you desire the mortgage to be canceled of record, equity says to you, you are asking our aid, you are coming into equity for affirmative relief, therefore you must do equity, and to do equity, you must offer to pay that money here and now by continuing the tender which you originally made. See *Tuthill v. Morris*, 81 N. Y. 94.

Q. A agreed with B by written contract to sell and convey to the latter a certain house and lot for \$10,000. Title to the house and lot was to be given the following day when B was to pay for the same and take his deed from A, and the contract was to be completed. Without any fault or negligence on the part of A or B, that night, the house which was worth 90% of the value of the property was totally destroyed by fire. Upon whom does the loss fall, and for what reason? In whom was the equitable title to the property at the time of the fire?

A. The vendee held the equitable title and therefore the loss

must fall upon him. "A loss by fire, or other accident, not due to the fault of the vendor, must fall upon the vendee, when the title is satisfactory and the contract is, therefore, capable of being specifically performed by the vendor. While at law the legal title may be said to be unaffected by the contract, a court of equity regards that which is agreed to be done as actually performed." *Sewell v. Underhill*, 197 N. Y. 172.

Q. A and B enter into an agreement in New York City, whereby B agrees to convey to A certain mining lands in California. B fails to deliver the deed on the day agreed upon. A brings suit in New York for specific performance. B defends on the ground that the court has not jurisdiction. Is the defense good? What maxim of equity is involved?

A. The defense must fail, as the court obtained jurisdiction of the person of the defendant by his appearance and answer, and therefore has the power to compel him to convey the land even though it was situated without the state. The maxim involved is: "Equity acts in personam." It matters not where the "res," the subject-matter of the contract, is situated; so long as the person is within the jurisdiction of the court, equity can force him to specifically perform. The decrees of a court of equity command a person to do a certain act, and if he fails to do so, the court will imprison him for contempt. The court of equity, unlike a court of law, acts upon the person, and not upon the thing which is the subject-matter of the contract. This principle has been very well settled since the early and historic case of *Penn v. Lord Baltimore*, 1 Ves. 444, and is uniformly followed in this state. *Gardner v. Ogden*, 22 N. Y. 327, 333; *De Klyn v. Watkins*, 3 Sandf. Ch. (N. Y.) 185.

Q. An insolvent merchant executed a voluntary conveyance to his son. Afterwards having effected a compromise with his creditors, he requests his son to reconvey. What are the rights of the father and son? What principle of equity is involved?

A. The father cannot force a reconveyance. The equitable maxim involved is: "He who comes into equity must do so

with clean hands." Voluntary conveyances are effectual between the parties and cannot be set aside by the grantor, although he afterwards becomes dissatisfied with the transaction. *Proseus v. McIntyre*, 5 Barb. 424; *Renfrew v. McDonald*, 11 Hun, 254. "A conveyance of land made in payment of a debt owing by the grantors, upon an understanding embodied in a contract executed by the parties immediately after the delivery of the deed, that the land is to be reconveyed to the wives of the grantors upon the payment of the debt and interest, is fraudulent as against the creditors of the grantors. As between the parties themselves to the transaction, the deed is valid." *Harris v. Osnowitz*, 35 App. Div. 594.

Q. A and B are adjoining property owners, and agree not to build within forty feet of the street. A builds within forty feet of the street, B not raising any objection thereto. Subsequently B starts to build within forty feet of the street, and A comes to you for advice and asks you if he can prevent B from so building. What would you tell him? What equitable principle is involved?

A. A cannot prevent B from building, he having already violated the agreement by himself building within the prohibited distance. The maxim involved is: "He who comes into equity, must do so with clean hands." *Sinsheimer v. U. G. W. of A.*, 77 Hun, 218; *Weiss v. Herlihy*, 23 App. Div. 608.

Q. A began an action in equity to restrain by injunction proceedings the collection of \$1,000 taxes, \$500 of which was illegally levied. What maxim of equity is involved in this transaction? What condition should the court exact?

A. The court should compel A to pay the \$500 which was legally levied, on the principle that: "He who seeks equity must do equity." Having sought the affirmative aid of a court of equity, he must act equitably, that is, pay the amount which is justly due. *Neblet v. McFarland*, 92 U. S. 101.

Q. A who was injured through negligence of the X Railway Co. brought an action to recover damages for his injuries.

Through the fraud and deceit of the attorney for the railway company he was induced to settle his claim for a small consideration. He now comes to you and asks what remedy he can pursue, if any. What is your advice? What equitable maxim is involved? Answer fully.

A. He can go into equity and ask that the settlement be set aside, but before doing so he must tender back the amount he received. The equitable maxim involved is: "He who comes into equity must do equity." "Under the facts of this case, if plaintiff so desires, he may file a bill in equity for the purpose of attacking and testing the validity of the settlement had between the parties, and of the written release executed in connection therewith. It is necessary for a tender to be made by plaintiff of the money received by him as a prerequisite to the exercise of the right of rescission. It is not questioned that the general rule is that where a party seeks to rescind a contract on the ground of mistake or fraud, and thereby seeks to relieve himself of the burdens imposed by the contract, he should not be permitted to retain the benefits. Seeking equity he must do equity." *Vandervelden v. Ry. Co.*, 61 Fed. Rep. 54.

Q. A gives a mortgage on his land to B as security for the payment of two notes made by A payable to B. One of the notes was given at a usurious rate of interest. A brings action in equity, seeking to have the mortgage canceled of record. Can the action be maintained? If not, why not? If so, what condition will the court impose before granting relief? What equitable maxim applies?

A. Equity will compel A to pay the amount of the legal note upon the principle that: "He who seeks equity must do equity." "Where a mortgage has been given upon lands, in order to secure the payment of several promissory notes, a part of which notes are usurious and a part of which are bona fide, although the mortgage is void, equity will require the plaintiff to do equity by paying or tendering payment of the amount of the valid notes covered by the mortgage, before it will entertain a

suit to cause the mortgage to be delivered up to be canceled as a cloud upon title." *Williams v. Fitzhugh*, 37 N. Y. 444. See also *House v. Carr*, 185 N. Y. 457.

Q. A gives a mortgage on his farm for \$10,000; the mortgage provides for a usurious rate of interest. A brings an action to set aside the mortgage on account of the usury. Can he maintain the action? What condition, if any, will the court exact? What maxim of equity arises?

A. A can maintain the action, and the court cannot impose any condition for granting relief. The maxim of equity which arises is: "He who seeks equity must do equity." In some other jurisdictions the borrower is compelled to repay the amount of the loan with legal interest as a condition for obtaining the relief. But in this state the rule is different according to our Statute, secs. 373 and 377 of the General Business Law (Consolidated Laws, chap. 20). "The mere fact that a party has made an agreement or given a security which is void for usury, is not sufficient to entitle him to apply to a court of equity to have the contract annulled. The right to this relief exists only when, from the form of the security, the defense cannot be made available at law, or where the instrument sought to be avoided is a cloud upon the title to land, or some other necessity for the interposition of a court of equity is shown." *Allerton v. Belden*, 49 N. Y. 373.

Q. A loaned to B \$5,000, taking a mortgage of \$6,000 on B's lands. After paying the interest on the mortgage for several years B died, leaving a will in which he devises the mortgaged lands to his son C. C thereafter commences an action for the surrender and cancellation of the mortgage on the ground that the same was usurious when made. B defends. Who should have judgment and why?

A. Judgment for B, as the right to have a mortgage cancelled for usury is merely personal to the borrower only. "The privilege given to a borrower by the usury act to go into a court of equity without doing equity is purely personal and does not

upon his death pass to his heirs, devisees or representatives. Neither the executor nor devisee of a mortgagor is a 'borrower' within the meaning of the statutes, and therefore they cannot maintain an action for the cancellation of a usurious mortgage, without first paying, or offering to pay, the sum actually loaned. *Buckingham v. Corning*, 91 N. Y. 525.

Q. A who is in pressing need of money, tells B that if he will let him have \$5,000, he will give him a mortgage on his real estate. B advances the \$5,000, but A refuses to give the mortgage. What are the rights of B?

A. B can sue to recover back the money loaned, or he can compel A to execute a mortgage; in the meantime he has a lien on the property by way of equitable mortgage. Where one party advances money to another, upon the faith of a verbal agreement by the latter to secure the payment by a mortgage on certain lands, and the mortgage is not executed, or if executed, is so defective or informal, as not to effectuate the purpose of its execution, equity will impress upon the land a lien in favor of the creditor, upon the principle that: "Equity regards as done that which ought to have been done." *Sprague v. Cochran*, 144 N. Y. 104.

Q. Upon A's marriage his uncle B, who was the owner of a certain house and lot, said to A that he makes him, (A) a present of the said house and lot. A at once went into possession and made some expenditures in permanent improvements thereon. These expenditures would amount to less than the rental value of the premises while occupied by A. B when he said that he makes A a present of the house and lot also said that he would give him a deed thereof. B died without having made such deed, and the executors of B brought an action against A in ejectment to oust him of possession. A defends. Who wins and why?

A. A wins. He was in possession and was the owner of the equitable title, and the action was not maintainable against him. The expenditures made upon permanent improvements

induced by the promise constituted in equity a consideration for the promise. "A parol gift of real estate and a parol promise to convey the same is valid and enforceable in equity, where the donee has entered into possession of the property and made permanent improvements thereon, on the faith of the donor's promise, and this, although when specific performance by the donee is claimed, the rental value of the property for the time it has been occupied by the latter would be more than the amount expended by him." *Young v. Overbaugh*, 145 N. Y. 158; *Cooley v. Lobdell*, 153 N. Y. 596; *Canda v. Totten*, 157 N. Y. 281; *Freeman v. Freeman*, 43 N. Y. 34.

Q. A sells B a horse in the presence of C who is the owner of the horse. C remains quiet at the time of the transaction, and subsequently sues B in replevin to recover the horse. Can the action be maintained? What equitable principle is involved?

A. No, the action cannot be maintained. The principle involved is that of equitable estoppel, or estopped in pais. C, having remained quiet, when another was selling his property as his own, is estopped from setting up his title against the purchaser. The maxim that: "He who has been silent, when in conscience he ought to have spoken, shall be debarred from speaking, when conscience requires him to be silent," applies in this case. *Grisslor v. Powers*, 81 N. Y. 57; *Hamlin v. Sears*, 82 N. Y. 327; *Geiler v. Littlefield*, 148 N. Y. 603.

Q. A stood by and allowed B to sell as his own A's wagon to C, of the value of \$500 for cash. A said nothing. He had an opportunity to tell the facts, but did not do so. C knew that A owned the wagon at the time, but relied upon A's silence to give him title. B has spent the \$500, and is insolvent. A demands the wagon of C, and threatens to replevy it. C consults you. What would be your advice?

A. A can recover the wagon. The doctrine of equitable estoppel can have no application to a case, where the party was not deceived by the owner's silence. Here C, knowing that the

title to the wagon was in A, was not misled by A's failure to speak, and therefore cannot invoke the doctrine of equitable estoppel. *Wilcox v. Howell*, 44 N. Y. 398; *Royce v. Watrous*, 73 N. Y. 597.

Q. A dies and by his will leaves certain real property to trustees with directions to sell the same and apply the proceeds to the use of B, his only son. B dies intestate. How should the property be distributed? What equitable principle is involved?

A. The property should be distributed according to the statute of distribution of personal property. Equity, regarding that as done which ought to have been done, considers the real estate as personal property. It is an instance of the so-called doctrine of equitable conversion. *White v. Howard*, 46 N. Y. 144; *Prentice v. Jansen*, 79 N. Y. 478; *Hood v. Hood*, 85 N. Y. 561.

Q. A became the holder and owner of two mortgages on the lands of B. When the same became due B had his wife pay the said mortgages from her own separate estate, with the understanding that she was to have an assignment of the mortgages made to her. However, instead of an assignment of the mortgages a satisfaction was obtained and recorded all without the knowledge of B's wife. What rights under the circumstances has the wife and what equitable principle is involved?

A. The wife can bring an action to have the record of the satisfaction of the two mortgages canceled, and also to have herself adjudged the owner thereof, and for their foreclosure. "As between the plaintiff and her husband these mortgages were never paid or satisfied. Equity does not give this wrongful deflection of the fund the force of payment, but considers what ought to be done as done. By the use of her money as described, under the agreement to obtain assignments, she became at once the equitable owner of those mortgages, with the right to enforce them." *Alden v. Barnard*, 15 Misc. 513; *Johnson v. Parmely*, 14 Hun, 398; *Purser v. Anderson*, 4 Edw. Ch. 18.

Q. A began by equitable proceedings an action of ejectment to obtain possession of certain lands occupied by B for several years peacefully under a claim of lawful title. B had made very valuable improvements thereon. What condition will the court exact before granting A's relief? Give reasons.

A. The court will compel A to pay B for the amount of the improvements actually made. One cannot go into a court of equity seeking to oust one who under a claim of lawful title has made valuable improvements to the land which he claims, unless he is willing to reimburse the party so making the improvements, because it would be inequitable to permit him to retain the benefits made by the other innocently. See *Thomas v. Evans*, 105 N. Y. 601; *Putnam v. Ritchie*, 6 Paige, 390.

Q. A owns two pieces of land. He was indebted to B and secured his indebtedness by a mortgage to B covering both these tracts. He subsequently became indebted to C, and he secured that debt by a mortgage covering one of the tracts only. The first creditor, whose debt is secured by the mortgage covering the two tracts, goes to foreclose his mortgage and seeks to satisfy same first out of the lot upon which his mortgage and the mortgage of the other creditor are liens. C objects. What are his rights? What principle of equity is involved?

A. The equitable doctrine of "marshalling assets" is involved in this case. Equity will compel B, who holds a mortgage on both lots as security, to exhaust his mortgage as against that lot not covered by C's mortgage, before resorting to the lot which is subject to both mortgages. "The facts present a case, where the creditor has a lien upon two funds for the security of his debt, and another party has an interest in only one of the funds without any right to resort to the other. In such a case, equity will compel the creditor to take his satisfaction out of the fund upon which alone he has an interest, so that both parties may if possible escape without injury." *Ingalls v. Morgan*, 10 N. Y. 173; *Farwell v. Bank*, 90 N. Y. 490.

Q. A and B each took a mortgage on the land of C at the same time. It was agreed between A and B that B's mortgage should be a prior lien, and B accordingly had his mortgage recorded before A's. A thereafter assigned his mortgage to D who knew that the mortgages of A and B were made simultaneously, but did not know that it was agreed that B's mortgage should be a prior lien. B began an action for the foreclosure of his mortgage, making D a party defendant as a subsequent lienor. D defends on the ground that the two mortgages are simultaneous and equal liens. Judgment for whom and why?

A. Judgment for B. D took the assignment of the mortgage subsequent to the agreement, therefore B's lien has priority and no estoppel can be claimed in favor of D, as B was under no duty to seek out D and disclose to him the arrangement with A, and so silence on B's part did not estop him from claiming the preference. "In order to found an estoppel upon mere silence, it must appear that there was a duty and opportunity, on the part of the party keeping silent to speak, and as he was conscious that his silence was, or would operate as, a fraud, and knew or ought to have known that some one was relying upon his silence and would be injured thereby. *Collier v. Miller*, 137 N. Y. 332. See also *Viele v. Judson*, 82 N. Y. 40.

Q. A owns certain lands. He gives two mortgages thereon, one to B and one to C. C pays the first mortgage to B, has a satisfaction written upon it and takes it. C then brings an action to foreclose the first mortgage. A, the owner of the land, defends on the ground that C having paid the first mortgage and taken a discharge of the same, thereby removed the lien from the land, and consequently cannot foreclose this mortgage. Judgment for whom and why? What equitable doctrine is involved?

A. Judgment for C. The equitable doctrine of "subrogation" applies in this case. Whenever to protect his own rights, one pays or satisfies a debt for which another is primarily liable, he is subrogated to the rights of the creditor, and may enforce

against the person primarily liable all securities, benefits and advantages held by the creditor. In this case, C being a second mortgagee his mortgage security was subsequent in lien to the first mortgage. When he paid the first mortgage, he was paying a debt which was a prior lien to the interest he had in the lands by reason of his second mortgage, and being in that position when he paid this first mortgage debt, he was entitled to succeed to all the securities for the enforcement of that debt which the first mortgagee had. The security for the enforcement of that debt held by the first mortgagee was his mortgage, and consequently equity will permit C to succeed to that security, and will treat this transaction as in fact vesting in him by assignment the title to the first mortgage. That being so, he may maintain this action to foreclose the mortgage. *Lewis v. Palmer*, 28 N. Y. 271; *Gans v. Thieme*, 93 N. Y. 225; *Pease v. Eagan*, 131 N. Y. 262.

Q. A was the owner of a farm which was mortgaged to B for \$2,000. When the mortgage became due A paid B the \$2,000 and took an assignment of the mortgage in blank. Thereafter A sold the farm to C subject to the mortgage of \$2,000. After C had taken title to the farm, A sold the mortgage to D, a bona fide purchaser, by inserting the name of D in the blank assignment of mortgage. D then demanded payment of the mortgage from C who heard of the transaction after he had taken title. Upon C's failure to pay the mortgage D began foreclosure. C defends on the ground that the mortgage was paid and satisfied, and demanded that the mortgage be discharged of record. Judgment for whom and why?

A. Judgment for D. In *Champney v. Coope*, 32 N. Y. 543, where the fact appeared that the money due on the mortgage was paid by the mortgagor, who took back an assignment in blank, which he subsequently caused to be filled in with the name of the plaintiff's intestate, and then delivered the bond and mortgage and assignment to the assignee, it was held that equity would preserve the mortgage according to the intention of the parties and the just requirements of the case; that the

payment by the creditor and the taking of the assignment in blank, did not necessarily extinguish the mortgage, where the intent of the parties thereto was that the mortgage should be kept alive, and where the equitable right of innocent parties required that it should be. This case has been followed in *Sturges v. Hart*, 84 Hun, 409; *Curtis v. Moore*, 152 N. Y. 159.

Q. A mortgages three parcels of land to D; later sells one parcel to B, another to C, and retains the third. Foreclosure proceedings are commenced, and B and C are made parties. C consults you as to his rights. What would you advise him to do, and what are his rights?

A. C has a right to have the lots decreed to be sold in the inverse order of their alienation. Therefore as one lot has not yet been conveyed, the title to it being still retained by the mortgagor, that lot must be sold first. The last conveyance was made to C, therefore his lot must be sold second. The third lot had previously been conveyed to B, his lot therefore must be sold last. The rule is well settled in this state. *N. Y. Life Ins. & T. Co. v. Milnor*, 1 Barb. Ch. 353; *Woods v. Spalding*, 45 Barb. 602; *Coles v. Appleby*, 87 N. Y. 114.

Q. A was the owner of a tract of land divided into lots which he sold to B, C, D and E. In each deed there was a covenant running with the land that the premises should not be used for any factory purpose. D leases his tract to a soap manufacturer, who begins work. Can he be enjoined from doing so?

A. Yes, for an equitable easement has been imposed upon the land. "Equitable easements are the rights, which neighboring owners of lots have, to enforce in equity restrictions as to the use or enjoyment of their property, which affect a number of lots in the same way, and were placed upon them by one and the same grants. A court of equity has jurisdiction to compel the observance of such a covenant, and will enforce a specific performance, in the absence of evidence that there has been any change in the character of the locality which has rendered it inexpedient to observe the covenant, or has made a

disregard of it indispensable to the practical and profitable use and occupation of the premises." *Trustees of Columbia College v. Lynch*, 70 N. Y. 440, a leading case on the subject of equitable easements. See also *Equitable Ass. Soc. v. Brennan*, 148 N. Y. 661.

(NOTE.) "A provision contained in a deed of one of three lots owned by a common grantor, 'that no building or edifice of any description whatsoever exceeding eight feet in height shall at any time hereafter be erected within thirty-two feet of the rear line of said two lots,' not coupled with any reservation of the condition in favor of the heirs or assigns of the grantee, will in the absence of any words giving a right of re-entry for its breach, be construed as a mere personal restriction for the benefit of the common grantor, especially where the history of the land, and the purpose to which the land has been devoted, show no necessity for its continuance, and the subsequent deeds of the property contain no mention of the conditions, and it appears that the persons who have owned the property regard the restrictions as obsolete." *Krekeler v. Aulbach*, 51 App. Div. 591, aff'd in 169 N. Y. 372.

Q. A covenant in a deed prohibits the building of anything but a dwelling house on the land. Through several conveyances the land comes into the hands of B, who commences to erect a factory on the lot, claiming that the surroundings have so changed that it is very unsuitable for a dwelling house. It is conceded in the agreed state of facts that the covenant runs with the land. Is B's contention good? If so, why so? If not, why not?

A. The contention is good, for in such a case equity will relieve the grantee from the restrictions imposed by the covenants. "When the owner of lands in a city has laid it out into lots, which are sold to different purchasers, each conveyance containing covenants on the part of the grantee running with the land, restricting the use thereon to the purpose of a private residence, or prohibiting the erection thereon of certain specified structures, while a court of equity has power to enforce the performance of those covenants, the exercise of this authority is within its discretion, and where there has been such a change in the character of the neighborhood as to defeat the object and purposes of the covenants, and to render it inequitable to deprive a grantee or his succes-

sors in title of the privilege of conforming his property to that character, such relief will not be granted, and in lieu thereof damages will be allowed. The court in awarding damages is not confined to those sustained before the commencement of the action, but may award permanent damages; but must require the plaintiff upon receipt of the damages awarded, to execute to the defendant a release of the covenant." *Ammerman v. Deane*, 132 N. Y. 355.

Q. The X Company, a telegraph corporation, with the consent of the highway commissioners, but without the consent of the property owners, placed their telegraph poles in the highway, the fee to which was in the adjoining property owners, subject to the usual right of the public in highways. A, an adjoining property owner, comes to you for advice. Is there any remedy for the owners, and if so, what?

A. The owners have an action for damages, but usually no injunctions are granted in these cases. "An injunction to prevent the erection in the street in front of the plaintiff's lot of an electric wire pole denied, because there was no evidence to show that if the defendant's work were allowed to proceed any irreparable injury would be done, or any injury which could not be compensated by pecuniary payment, and upon the further ground, that if the injunction were allowed to stand, a public improvement would be obstructed for many months, which in the end might be allowed to proceed." *Tracy v. R. R.*, 54 Hun, 550.

Q. A gave to B a mortgage of \$10,000 on his house and lot. Later he gave to C another mortgage of \$5,000. B began an action to foreclose his mortgage on the ground that A has failed to pay taxes. C, desiring to prevent the sale of the house, as the same will not bring more than the first mortgage, requests you to take the necessary proceedings to prevent the same. He states to you facts showing that B's mortgage is invalid. What would you do?

A. C has the right to test the validity of a prior mortgage,

growing out of the fact that he would have the right to redeem, therefore he can take such measures to see that the fund remaining after the sale is as large as possible to cover his mortgage. C can also bring proceedings for the cancellation of B's mortgage on the ground that it is invalid, and in this action obtain an injunction restraining B's action of foreclosure. Section 604 of the Code of Civ. Pro.; *Gage v. Brewster*, 31 N. Y. 218; *Franklyn v. Hayward*, 61 How. Pr. 43; *Denton v. Bank*, 150 N. Y. 126.

Q. A is in possession of B's farm through an illegal contract executed between A and B. B now seeks to oust A of the possession, and brings an action of ejectment against A, setting up the illegal contract. A demurs. Judgment for whom and why?

A. Judgment for A. A court of equity will not be a party to an illegal contract by assisting one of the parties thereto, to right a wrong. *Leonard v. Poole*, 114 N. Y. 371. "A court of equity will not determine the respective rights and interests of persons arising out of an unlawful agreement, but will leave the parties where it finds them in all cases where the action is in affirmance of such an agreement." *Unckles v. Colgate*, 148 N. Y. 529.

Q. A is the owner of certain real estate. He remains out of possession for one year. During his absence, B, claiming title, makes a deed conveying the property to C. C records his deed and goes into possession. A, learning of these facts, brings an action against C to compel him to cancel the fraudulent deed of record, as being a cloud upon his title, that the deed be delivered up to him, and for further equitable relief. Can the action be maintained? If so, why so? If not, why not?

A. No. A should bring the action of ejectment. It is held that a bill to remove a cloud upon title, can be maintained in this state, only where the plaintiff is in actual possession of the property. The reason is, that where defendant is in possession,

plaintiff can bring ejectment and thus test his title at law. *Cox v. Clift*, 2 N. Y. 118; *Nichols v. Voorhis*, 18 Hun, 33; *Western R. R. Co. v. Nolan*, 48 N. Y. 513.

Q. A is the owner of and in possession of a certain tract of land. B, a swindler, forges A's name to a deed of the property. B has a false certificate of acknowledgment added, and puts the deed on record, C, a confederate, being named as grantee. A brings action for the removal of the deed from the record as a cloud upon his title. Can the action be maintained? State your reasons.

A. Yes. "Where the law raises a presumption without direct proof of the validity of a conveyance, and its invalidity can only be made to appear by extrinsic evidence, a case is presented for the exercise of the jurisdiction of a court of equity, to compel the surrender and cancellation of a conveyance as a cloud upon title. Such is the case of a forged deed, which on the strength of a false certificate of acknowledgment, has been put on record." *Remington Paper Co. v. O'Dougherty*, 81 N. Y. 474.

(NOTE.) "An action to remove a cloud upon title, or to restrain a sale or conveyance, upon the ground that it would create such a cloud, can only be maintained where the pretended title, which is alleged to constitute the cloud, or the proceeding which it is apprehended will create one, is apparently valid on its face, and the party in possession will be compelled to resort to extrinsic evidence to show the invalidity of the pretended title, and to defend his own. But, when the pretended claim is invalid on its face, or where it requires extrinsic facts to be proved for the purpose of establishing its validity, a court of equity will not interfere on the ground that the facts which are essential to sustain the pretended claim do not exist, but will leave the party in possession to his defense. These are the general and well-settled rules." *Rapello, J., in Lehman v. Roberts*, 86 N. Y. 239. See also *Scott v. Onderdonk*, 14 N. Y. 9; *Fonda v. Sage*, 48 N. Y. 173.

Q. A borrows \$10,000 of B and gives as security a deed of his house and lot. The deed was absolute on its face. The loan was to be returned in one year with interest. At the expiration of the year, A tendered to B \$10,000 and the interest due, and demanded a reconveyance. B refused to reconvey,

claiming that he had bought the land. What is the nature of the transaction between them? State the remedy, if any.

A. A can bring an action in equity to have the deed declared a mortgage. "The rule that a deed absolute on its face can in equity be shown by parol or other extrinsic evidence to have been intended as a mortgage, has been upon the fullest consideration deliberately established in this state, and will not be departed from." *Horn v. Keteltas*, 46 N. Y. 605; *Odell v. Montross*, 68 N. Y. 499; *Macauley v. Smith*, 132 N. Y. 524; *Mooney v. Byrne*, 163 N. Y. 86.

Q. A sues B for trespass, claiming that B entered upon his premises and polluted a well upon his lands. B answers by general denial. A, on the trial, proves possession of, but not title to the premises. B offered to prove title in another person. The court refused to receive the evidence. Should it have been admitted? What effect on the judgment would it have had, had it been received and title to the premises proved to be in another person?

A. The evidence should not have been admitted. "An illegal possessor may maintain trespass for an entry upon him against all the world, except the rightful owner." *Evertson v. Sutton*, 5 Wend. 281. "While it is true, that plaintiff may maintain an action of trespass, by showing actual possession and occupation alone without alleging and proving title, yet under such allegation and proof, he could not recover for damages to the freehold." *Taylor v. Wright*, 36 App. Div. 568. It will be observed in the question put, the action was simply one of trespass and not one for damages; therefore if the evidence were admitted it would have no effect upon the judgment.

(NOTE.) When an act of trespass is a continuing one, a court of equity will grant relief so as to prevent a multiplicity of suits. See *Wheelock v. Noonan*, 108 N. Y. 179; *Sadlier v. City of New York*, 185 N. Y. 408.

Q. A contracts with B for twenty chests of tea. B delivers ten chests, and then refuses to perform as to the other ten

chests, although it is within his power to do so. A brings action to compel B to specifically perform his contract. Can the action be maintained?

A. No. A has an adequate remedy at law in a suit for damages for a breach of the contract. The extraordinary equitable remedy of specific performance can only be invoked when the plaintiff has no adequate remedy at law. *Philips v. Berger*, 2 Barb. 608.

Q. A agrees with B to sell certain real estate for \$10,000, deed to be delivered and payment made at a certain time. B signs an agreement which satisfies the Statute of Frauds. At the appointed time, A presents a good and sufficient deed and demands the money. B refuses to perform his contract. Will equity decree specific performance? Substitute in the above case \$10,000 of stock instead of the real property. What would your answer be?

A. As to the real property, specific performance will be decreed on the principle of mutuality of remedies. An agreement to convey real property will always be specifically enforced, as there is no adequate remedy at law in a suit for damages, it being impossible to measure the damages with certainty, as each piece of real estate may have a peculiar value to the prospective purchaser on account of its location, etc. As the vendee can thus enforce specific performance, equity, applying the doctrine of mutuality of remedies, gives the vendor the same remedy, and allows him specific performance when the vendee refuses to perform. *Rindge v. Baker*, 57 N. Y. 209. As to the stock, there is an adequate remedy at law, as it can be purchased in open market and the damages readily estimated; therefore specific performance should not be decreed, unless the stock could not easily be purchased in the market. *Johnson v. Brooks*, 93 N. Y. 337.

(NOTE.) A court of equity will enforce a parol contract which has already been executed, although void by the Statute of Frauds. *Smith v. Smith*, 125 N. Y. 224.

Q. A, an art collector, desiring to complete his art gallery entered into an agreement with B to purchase from the latter a certain exquisite painting for \$5,000, its fair market value. B refuses to deliver the painting and A comes to you for advice and desires to know whether he can compel B to give him the painting. What would you advise and why?

A. A can obtain specific performance. "The rule of specific performance will be extended to personal contracts, where the party wants the thing in specie and he cannot otherwise be compensated. That is to say, the extension of the rule to such cases is justified, where there would not be a complete and satisfactory remedy by compensation in damages, where the benefits of the contract would not inure fully to the party, in whose favor it was made, unless it was specifically performed." *Bomeisler v. Forster*, 154 N. Y. 239. See also *Butler v. Wright*, 186 N. Y. 259.

Q. A buys a certain piece of land from B. Afterwards he brings an action for the reformation of the deed, claiming that when he bought the property he supposed that there were certain copper mines on the land, and would not have bought it if he had not supposed this. Will a court of equity grant him this relief? If so, why so? If not, why not? State your reasons.

A. A cannot procure the relief desired in the absence of fraud on the part of B, the mistake not being mutual. "In the absence of fraud, a party cannot obtain reformation of a contract, because it is not what he wanted it, but as the other intended it to be, nor because the effect proved different from what he supposed, when it was just what the other party supposed and intended it to be. There must be either mutual mistake, or mistake on one side and fraud on the other. While equity will give effect to the mutual understanding and intention of parties and perform written agreements to conform thereto, it cannot make new contracts for parties against their will." *Curtis v. Giles*, 7 Misc. 590. See also *Wilson v. Deen*,

74 N. Y. 531; *Paine v. Jones*, 75 N. Y. 593; *Avery v. Eq. Soc.*, 117 N. Y. 451.

Q. A sues to reform a contract, because at the time of making it, he was under such a mistake of fact as to have changed his whole intention had he known the truth. Upon the trial both parties move for a verdict. Upon the facts alone stated above, who would have judgment? Would any additional fact change the decision? If so, what fact?

A. Upon the facts stated judgment should be for the defendant, but if either mutual mistake, or mistake on the part of the plaintiff and fraud on the part of the defendant be shown, then judgment must be for the plaintiff. "A mistake which will warrant a court of equity to reform a written contract must be a mistake by both parties, or by one by which his intentions have failed of expression, and with it fraud in the other in taking advantage of the mistake, and obtaining a contract with the knowledge that the one dealing with him is in error in regard to its terms." *Bryce v. Ins. Co.*, 55 N. Y. 240.

Q. A, who is the financial agent of a corporation, has a voluntary accounting with it. A signed an instrument acknowledging that he is indebted to it for a certain sum. Afterwards A brings an action in equity for the reformation of the instrument, and alleges that at the time of the settlement he added the column, but did not examine the items, and that one of the items is wrong. He acknowledges that the corporation at the time of the settlement believed the instrument to be true. The corporation puts in a demurrer. Judgment for whom and why?

A. Judgment for the defendant, as the mistake here was not mutual, and there was no fraud on the part of the defendant. A party who seeks the reformation of an instrument on the ground of mistake of fact, must establish by the clearest evidence that the mistake was mutual, that a different agree-

ment was intended by the parties, and that fraud has been exercised by the other. *Pitcher v. Hennessy*, 48 N. Y. 415; *Ford v. Joyce*, 78 N. Y. 618; *Allison Bros. Co. v. Allison*, 144 N. Y. 22.

Q. A buys a piece of land of B, and by mutual mistake part of the description in the deed was left out. Subsequently B sues A in ejectment, and A wishes to defend. A comes to you for advice. What are his rights? How would you proceed to enforce them?

A. The mistake being mutual, A can go into equity and obtain a reformation of the deed to accord with the intentions of the parties. He can then set this up as a defense to the ejectment suit. *Paine v. Upton*, 87 N. Y. 327.

Q. A agrees to buy a house from B for \$7,000. The deed is to be delivered the next day. A gives \$1,000 to bind the bargain. B takes the money and on the next day tenders the deed to A, who refuses to accept it and to complete the purchase as agreed, at the same time demanding a return of his money. The agreement was verbal. B comes to you for advice. What are his rights?

A. B has the right to retain the \$1,000, A having broken the contract. B, however, cannot secure specific performance, as the contract not having been reduced to writing is void. (Section 259 of the Real Prop. Law, Consolidated Laws, chap. 50.) Part payment is not sufficient to take the contract out of the statute and secure specific performance. "It is a general rule that the mere payment of purchase money is not sufficient to authorize a judgment requiring specific performance of a verbal agreement for the sale of lands, except in a case where an action at law to recover the amount paid would not, under the circumstances, give the purchaser an adequate remedy. But where the purchase money has been paid and the possession under the contract has also been taken, the contract will be specifically enforced." *Dunckel v. Dunckel*, 141 N. Y. 427. See also *Pawling v. Pawling*, 86 Hun, 502; *Gibbs v. Horton Co.*, 61 App. Div. 621.

Q. Your client placed in the hands of his agent \$5,000 in cash, in trust to be invested for him in bond and mortgage. Instead of doing so, the agent used the entire fund except \$1,000 in paying his personal debts. Thereafter he made an assignment for the benefit of his creditors. His estate to the amount of \$10,000 came into the hands of his assignee. Is your client entitled to a preference to the amount of his debt in the distribution of his assets?

A. No. The preference will only be allowed for the amount of the fund coming into the hands of the assignee, that is, \$1,000. "The trust fund, with the single exception mentioned, was misappropriated by W to the payment of his private debts prior to the assignment. It cannot be traced into the property in the hands of the assignee, for the plain reason that it is shown to have gone to the creditors of W in satisfaction of their debts. The court below seems to have proceeded upon a supposed equity springing from the circumstances, that by the application of the fund to the payment of W's creditors the assigned estate was relieved pro tanto from debts which otherwise would have been charged upon it, and that thereby the remaining creditors, if entitled to distribution without regard to the petitioner's claim, will be benefited. We find this quite too vague an equity for judicial cognizance. The preference should be allowed, only to the extent of the trust fund coming into the hands of the assignee." *Matter of Cavin v. Gleason*, 105 N. Y. 256.

Q. A sold to B a farm for \$5,000. B paid him \$2,000 cash and agreed to pay the balance in two weeks. B, in the meanwhile, gave a mortgage thereon to C who knew of the transactions between A and B. Whose lien is superior, A's or C's?

A. A's lien is superior as equity will impress upon the land a vendor's lien in favor of A. As C's mortgage was taken with the knowledge of A's lien, it will be considered in equity to be subordinate to A's lien. *Hubbell v. Hendrickson*, 175 N. Y. 175.

(NOTE.) "That where a vendor delivers possession of an estate in land to a vendee without receiving the purchase price, equity gives the vendor a lien upon the land therefor, although there was no special agreement for that purpose, has been too long and too firmly established to require discussion. The death of the vendee does not alter or defeat the lien, nor does the taking of a promissory note affect it. If a part be paid, the lien is good for the residue, and the vendee is a trustee for that which remains unpaid." *Garson v. Green*, 1 Johns. Ch. 308; *Chase v. Peck*, 21 N. Y. 581; *Benedict v. Benedict*, 85 N. Y. 625; *Maroney v. Boyle*, 141 N. Y. 462.

CHAPTER XI

Insurance

Q. A delivers some cloth to B to have same made into suits. B insures the same in the X Insurance Company. During the progress of the work, the cloth is destroyed by fire. B puts in his claim for the amount of the insurance. The insurance company refuses to pay, claiming that B had no insurable interest in the goods. B sues the company. Can he recover? Answer fully.

A. B can recover, for he has an insurable interest. Agents, commission merchants, bailees or others having custody of, and being responsible for property, may insure in their own names, and they may, in their own names, recover of the insurer, not only a sum equal to their own interest in the property by reason of any lien for advances or charges, but the full amount named in the policy up to the value of the property. The right is put upon the fact, that having possession of the property, exclusive as to all but the owner to whom they are responsible, they have the right to protect themselves from loss, so that the property or its value may be rendered to the owner when he calls for his own. *Waring v. Ins. Co.*, 45 N. Y. 606.

Q. A obtains a judgment against B. B's only property is a building which A's judgment is a lien against. A takes out a fire insurance policy in the X Company for his own benefit on the building of B. The building is destroyed by fire, and A puts in a claim for the insurance which the company refuses to pay. He brings suit. Can he recover?

A. Yes. "A legal or equitable title is not necessary to give an insurable interest in the property; if one has a right which

may be enforced against the property, and which is so connected with it that injury thereto will necessarily result in a loss to him, he has an insurable interest. When insurance is upon property, not only must the insured have an interest in the subject-matter of the contract at its inception, but also at the time of the loss, for the contract being one of indemnity, recovery by the insured is limited to the loss actually sustained by him. As soon as his interest in the property ceases, the contract is at an end from the impossibility of any loss happening to him afterwards." *Rohrbach v. Ins. Co.*, 62 N. Y. 47. See also *Cross v. Ins. Co.*, 132 N. Y. 133.

Q. A entered into a written agreement with B whereby the latter agreed to sell and convey to A one month after the date of the agreement a house for the sum of \$10,000 which A agreed to pay upon the delivery of the deed. A at once took out a fire insurance policy in the X Company. Before any part of the purchase money was paid and before the delivery of the deed, the house burned. The insurance company refused to pay the loss to A claiming that he had no insurable interest. A brings suit upon the policy. Can he recover?

A. Yes. A had an insurable interest in the property, because the contract with B was enforceable. *Berry v. Ins. Co.*, 132 N. Y. 49; *Burke v. Ins. Co.*, 100 App. Div. 108.

Q. A, a stockholder in the X Corporation, insures a certain building belonging to the corporation for his own benefit. The building is destroyed by fire, but the insurance company refuses to pay the loss to A, claiming that he had no insurable interest in the property. Upon suit by A against the insurance company, what should the judgment be?

A. Judgment for A. It is not necessary to constitute an insurable interest, that the interest is such that the event insured against would necessarily subject the insured to loss. It is sufficient that it might do so, and that pecuniary injury would be the natural consequences. A stockholder in a corporation has such an interest in the corporate property, and so

he may protect the same by an insurance of specific tangible property of the corporation. *Riggs v. Ins. Co.*, 125 N. Y. 7.

Q. A was the owner of a certain lot of land upon which B was constructing a building under a contract binding him, B, to furnish the necessary materials and complete the building within a certain time. A was to pay for the construction of the building after its completion. Before the building was completed A took out a policy of fire insurance in the X Insurance Company for its full value. A had paid nothing for the materials or for the work done, when the building was totally destroyed by fire. A brings action against the insurance company on the policy to recover the value of the building destroyed. Judgment for whom and why?

A. Judgment for A. The liability of an insurer to pay for the loss of a building destroyed by fire is not affected in the absence of any exemption in the policy by the fact that it cost the owner nothing or that he might compel another person to replace it without expense to him. *Foley v. Ins. Co.*, 152 N. Y. 131; *Michael v. Ins. Co.*, 171 N. Y. 39.

Q. A owed B \$10,000. B, acting on his own behalf, took out a policy on the life of A and paid the premiums. A died having paid to B the \$10,000, and the policy was outstanding. To whom does the policy go?

A. The policy belongs to B, the creditor. Where a creditor procures an insurance upon the life of his debtor, his insurable interest continues although the latter has paid the debt before the debtor's death. The contract of life insurance is not one for indemnity merely, and if the insured had an interest in the life when he took the policy, he may recover although the interest has ceased. *Rawls v. Ins. Co.*, 27 N. Y. 282; *Goodwin v. Ins. Co.*, 73 N. Y. 497; *Ferguson v. Ins. Co.*, 32 Hun, 306.

(NOTE.) It is well settled that a creditor has an insurable interest in the life of his debtor, so employers and employees have insurable interests in the lives of each other, so also partners, and near relatives, such as parent and child, sister and brother. The only reason in life insurance for requiring

an insurable interest is to eliminate from the contract the character of a wager. *Hoyt v. Ins. Co.*, 3 Bosworth (N. Y.), 440; *Grattan v. Ins. Co.*, 15 Hun, 75. In *Wright v. M. B. L. Assn.*, 118 N. Y. 237, it was held that the plaintiff could recover the whole amount provided by the policy although the debt owing to the payee by the insured, to secure which the insurance was taken out by the plaintiff, was less than the sum insured.

Q. A policy was taken out by B on the life of A, her husband, payable upon his death "to his wife." Subsequent to the issuing of the policy, A divorced his then wife for adultery. A shortly thereafter dies and B, his former wife, claims the proceeds of the policy. The company refuses to pay the policy to her on the ground that she is no longer his wife. B brings suit. Can she recover?

A. Yes. As B had an insurable interest at the time of the issuance of the policy, her rights thereunder could not be defeated by a severance of the relationship of husband and wife. *Steinback v. Diepenbrock*, 158 N. Y. 20; *Conn. Mut. Ins. Co. v. Schaefer*, 94 U. S. 457.

Q. A insures his life for the benefit of B, his old friend. A subsequently with B's consent assigns the policy to C, a stranger, for \$1,000. A dies, and C claims the amount of the policy from the company. The company refuses to pay, and C brings suit. The company defends on the ground that B and C had no insurable interest in the life of A. Judgment for whom and why? State your reasons.

A. Judgment for C. A valid policy of insurance effected by a person upon his own life is assignable like any ordinary chose in action. The assignee for value of such a policy is entitled upon the death of the party whose life is insured, to recover the full sum insured without reference to the amount of the insurance paid by him for the assignment. As life insurance is not regarded as a contract of indemnity merely, any person may insure his own life for the benefit of a stranger. *St. John v. Ins. Co.*, 13 N. Y. 31; *Valton v. Ass. Co.*, 20 N. Y. 32.

(NOTE.) "A life insurance policy is not a contract of indemnity; it is a contract to pay a sum of money upon the death of the assured in considera-

tion of certain payments being duly made at fixed periods during his life. If the insurance is made upon the application of one who has no insurable interest whatever in the life insured, it is a wager policy, that is to say, a speculative contract, which the law condemns. But a person may insure his own life and provide in the contract of insurance that the money shall be payable to anyone whom he may appoint or assign the policy to. What will distinguish the one contract from the other is the fact as to the party actually contracting with the insurer and the distinction is substantial and controlling accordingly." Gray, J., in *Reed v. Provident Soc.*, 190 N. Y. 118.

Q. Plaintiff at 10 o'clock A. M. went to the office of the defendant Fire Insurance Company, and agreed orally with the proper officer for an insurance. At noon, and before the policy was written, the property was destroyed by fire. Plaintiff immediately tendered the premium. The payment of loss was refused, and plaintiff brings action. Can he recover?

A. The plaintiff can recover the amount of the loss. A recovery can be had upon a parol contract to insure, although no policy was ever issued by the insurer, if it appears that the insured applied for insurance, that the company accepted the risk, and that the premium was tendered. *Clarkson v. Assn. Co.*, 92 Hun, 527. "An oral contract to insure is valid, and the law reads into the contract the standard fire insurance policy of the state of New York, whether it was referred to in terms or not." *Hicks v. Assn. Co.*, 162 N. Y. 284. So also *Northam v. Ins. Co.*, 165 N. Y. 666; 177 N. Y. 74.

Q. A has a policy in the X Life Insurance Company, and fails by neglect to pay the premium on January 1, 1914, the due day; the following May he dies, and his representatives sue the company for the amount of the policy. Can they recover?

A. No. "Punctuality in the payment of premiums in the case of a life insurance policy is of the very essence of the contract, and if payment is not made when due, the company has the right to forfeit it if such is the contract. The rule that strict construction is to be given to a provision of forfeiture in a policy of insurance, and that it may not be extended for

the purpose of working a forfeiture beyond the strict and literal meaning of the words used, applies only where the meaning is doubtful, and the words capable of two constructions. Where the language is plain and unequivocal and the meaning not in doubt, in the absence of fraud or mistake, the contract must be enforced as it reads." *Holly v. Ins. Co.*, 105 N. Y. 437.

(NOTE.) Where the insured requested the insurance company to inform him whether or not a former premium has been paid, and the company informed him that it was, it was held that a recovery upon the policy would be allowed although the premium had not been paid. *Meeder v. Assn. Soc.*, 177 N. Y. 432.

Q. A takes out a policy of fire insurance in the X Insurance Company. It provides that the policy shall be void if any mechanics shall be employed in repairing the building for longer than twenty days without notice to the company. A employed mechanics to repair the house without giving notice to the company, it taking thirty days to complete the work. Afterwards when the mechanics have left, and from a cause in no way connected with their work, A's house takes fire and is destroyed. The company refuses to pay. A brings suit. Can he recover?

A. No, for a condition of the policy was violated by A, and this rendered it void and unenforceable. Where a policy of fire insurance is issued containing conditions, a violation of which by the terms of the policy avoids it, the insured will be held strictly to his contract, however immaterial to the risk the matter stipulated against may be. *Mack v. Ins. Co.*, 106 N. Y. 560; *Newport Imp. Co. v. Ins. Co.*, 163 N. Y. 237.

Q. The X Insurance Company, through one of its agents, issued a policy of fire insurance for \$5,000 upon B's shoe factory. One of the conditions of the policy provided that "if a building is insured that is on leased land, the same must be specifically represented to the company, and expressed in this policy in writing; otherwise this policy shall be void." B's factory was on leased land, and was not expressed in the policy, although the company's agent knew about it when he issued

the policy. The factory was destroyed by fire and the company refuses to pay the loss, claiming that the policy was void on the grounds stated. B sues the company for the loss sustained. Judgment for whom and why?

A. Judgment for B. The policy was not avoided and the insured can recover as the knowledge of the agent is chargeable to the company. In *Van Scoick v. Ins. Co.*, 68 N. Y. 434, an action upon a similar policy, it was held: "that as the knowledge of the agent was the knowledge of the principal when it accepted the risk, it had information that the building stood upon leased ground; that it was to be presumed that defendant had overlooked the condition, and so had forgotten to express the fact in the policy, or that it waived the condition or held itself estopped from setting it up, as to presume otherwise, would be to impute to defendant a fraudulent intent in issuing a policy known by it to be invalid." And this rule has been followed in *Whited v. Ins. Co.*, 76 N. Y. 519; *Woodruff v. Ins. Co.*, 83 N. Y. 140; *Short v. Ins. Co.*, 90 N. Y. 16; *Robbins v. Ins. Co.*, 149 N. Y. 434.

Q. A takes out a policy of fire insurance in the X Company, the policy prohibiting other insurance unless the consent of the company was indorsed thereon. It also provided that none of the agents should have power to waive any of its provisions except by a written indorsement on the policy. A had no other insurance at the time of the delivery of the policy. When the agent delivered the policy A informed him that he intended to procure other insurance, but did not have any indorsement made on the policy. Thereafter A procures two other policies in different companies and a fire occurs, and the company refuses to pay the loss. A brings suit. Can he recover?

A. No. The delivery of the policy by the agent did not constitute a waiver of the provision as to other insurance or estop the company from setting it up, as the policy was valid in its inception, for neither of the other policies had been issued but were subsequently obtained. The policy only became invalid by A's act in procuring additional insurance without

obtaining an indorsement on the policy of the company's consent. As the company issued a policy which was valid when delivered, the notice to the agent of intentions to take out other insurance did not estop the company nor constitute a waiver. The distinction must be drawn between "the knowledge by the agent of an existing fact which renders a policy void when delivered, and the omission of the insured to give notice of and secure the required consent to a subsequent act, which by its conditions invalidates the policy although previously consented to." *Gray v. Ins. Co.*, 155 N. Y. 184; *Baumgartel v. Ins. Co.*, 136 N. Y. 547; *McNierney v. Ins. Co.*, 48 Hun, 239.

(NOTE.) "The use of the Standard policy was compelled by legislative enactment to remedy existing evils and, among others, to protect insurance companies from the perils of alleged parol waivers by their local agents. Every person who now enters into a contract of insurance is required to agree that no officer or agent or other representative of the company shall have power to waive any provision or condition of the policy, except such as by the terms thereof may be subject of agreement indorsed thereon, and as to such provisions and conditions the waiver must be written upon or attached to the policy and he specifically covenants that he will not claim any privilege or permission unless it be in writing." *Moore v. Ins. Co.*, 141 N. Y. 224; *Northern v. Ins. Co.*, 166 N. Y. 319.

Q. An insurance policy provides that if the property insured now or hereafter has a chattel mortgage upon it, the policy shall be void. A, the insurance agent of the company, insures B's personal property, there being at the time a chattel mortgage thereon, which is filed in the county clerk's office. The property is subsequently destroyed by fire. B, not having made any concealment, and having acted in good faith, brings suit against the insurance company. The company claims that the policy is void because of the mortgage. Judgment for whom and why?

A. Judgment for the company, as there was a violation of a condition of the policy. It matters not that the mortgage was recorded, as the company cannot be charged with notice thereby, in the face of an expressed condition in the policy. The

question of good faith is not material, when the policy expressly stipulates that it shall be avoided in the case of a violation of a condition. This condition was a warranty and avoided the policy. "The distinction between a warranty and a representation is that the former is contained in and forms part of the contract, and must be complied with whether material to the risk or not, while the latter is outside of the contract, and is immaterial whether it is true or false unless material to the risk." *Chase v. Ins. Co.*, 20 N. Y. 52.

Q. There is a fire insurance upon a mill, the policy providing that it shall be null and void if the mill ceased to be operated for more than ten consecutive days, or became vacant or unoccupied, and so remained for ten days. The mill is closed and inoperative for a week in order that repairs to the machinery may be made. The next week it is inoperative, because the miller is so sick that he cannot work. The mill takes fire on the last day of the two weeks and is destroyed. The miller brings suit against the company upon their refusal to pay the loss. Can the action be maintained?

A. Yes, judgment for the miller. The case of *Ladd v. Ins. Co.*, 147 N. Y. 478, is exactly in point. The headnote to that case reads: "A mere temporary cessation of the operation of the machinery in a manufacturing establishment by reason of sickness, break-down, low water or other unavoidable cause, without any intention on the part of the insured to cease operating, or to allow the premises to become vacant or unoccupied, is not of itself to be deemed a violation of the provisions of a fire insurance policy, avoiding it in case the establishment ceased to be operated for more than ten consecutive days, or became vacant or unoccupied and remained so for ten days."

Q. Upon an action on a fire insurance policy by A against the X Company, it appeared that A was the owner of a country dwelling house which was used by him during the summer, and in the fall he left his furniture therein in charge of a caretaker who lived and slept in another house on the farm and inspected

the same regularly and at least once a week. A visited the house regularly and at least once in two weeks made a thorough inspection of the house. No one slept in the house. The policy among other things provided that the policy shall be void if the insured dwelling house, whether intended for occupancy by owner or tenant, be or become vacant or unoccupied and so remained for ten days. The above facts appearing, who should have judgment and why?

A. Judgment for the company, as the house was unoccupied although not vacant. The case of *Herman v. Ins. Co.*, 85 N. Y. 162, is exactly in point, and it was there held that: "for a dwelling house to be a state of occupation, there must be in it the presence of human beings as at their customary place of abode, not absolutely and uninterruptedly continuous, but that must be the place of usual return and habitual stoppage."

Q. A takes out a policy of fire insurance on his stock of clothing for one year. During the summer months he sold out the entire stock and kept his place closed. In the fall A opened his place with a new stock of clothing, and a few weeks thereafter a fire broke out destroying A's entire stock. The company refuses to pay the loss claiming that they had not insured the stock in question. Conceding the above facts as stated, who should have judgment and why?

A. Judgment for A. The policy was a continuing one, and although the liability thereon was suspended by the sale of the stock, it was revived by the bringing of new goods in the same place. "Had a fire occurred during the time, no recovery could have been had against the underwriters, not because the policy had become void, but because the insured has suffered no loss. The owners of the goods would have had no claim for the reason that at the time they had no interest in the policy, yet the policy continued to be a valid subsisting contract in the hands of the insured, and had they subsequently purchased the same goods or other goods and brought them into the store, they would have been covered by it." *Hooper v. Ins. Co.*, 17 N. Y. 424; *Hoffman v. Ins. Co.*, 32 N. Y. 405.

Q. A took out a policy of fire insurance in the X Company on his horses, cattle and sheep in the sum of \$6,000, \$4,000 thereof being on the horses and cattle and \$2,000 on the sheep. The policy provided that "this entire policy shall be void if the subject of the insurance be personal property and be or become incumbered by a chattel mortgage." After the issuance of the policy A executed and delivered a chattel mortgage on the horses and cattle in the sum of \$3,000. Thereafter and while the mortgage was alive a fire occurred destroying all of the insured property. There was a total loss of \$4,000 on the horses and cattle and \$2,000 loss on the sheep. Upon the refusal of the company to pay the loss, A brings suit. Judgment for whom and why?

A. A can recover for the sheep only, as they were not mortgaged, but no recovery can be had for the horses and cattle which were the subject of a chattel mortgage. "Where the insurer's risk is distributed among several subjects of insurance and limited in amount as to each, there are as many distinct insurances as subjects, and an avoidance of the policy as to one subject, will not avoid it as to others, unless such clearly appears to have been the intention of the parties." *A. H. G. S. Co. v. Ins. Co.*, 1 Misc. 114; *Merrill v. Ins. Co.*, 73 N. Y. 453; *Pratt v. Ins. Co.*, 130 N. Y. 206. "Where a policy of fire insurance covers different kinds of property, each separately valued, the contract is severable even if but one single premium is paid, and the amount insured is the sum total of the valuation; but where the articles are not separately valued the contract is entire and indivisible, and a cause of forfeiture in respect to part of the property affects the entire contract." *Fitzgerald v. Ins. Co.*, 61 App. Div. 350.

Q. A insures his building against loss by fire in the sum of \$5,000. In the policy was a provision to the effect "that the entire policy should be void, if the interest of the insured be other than an unconditional and sole ownership." At the time the policy was issued, there was a mortgage on the premises for \$5,500. The existence of this incumbrance was not disclosed

to the insurance company that issued the policy. Upon the total destruction of the building by fire, the company refuses to pay the loss. A brings suit on the policy. Can he recover?

A. Yes. The policy was not vitiated by the omission of all reference to the mortgage. The insured held the legal title to the property, and was the sole and unconditional owner thereof within the meaning of those terms as therein used. *Moulton v. Ins. Co.*, 25 App. Div. 275.

(NOTE.) "The effect of a chattel mortgage is to convey the title of the property to the mortgagee and thereafter the mortgagor's interest is that of an equity of redemption and nothing more. Therefore, the interest of the assured in the personal property was not that of a sole, entire and unconditional ownership, and so much of the contract as related to that class of property was void by the very terms of the condition." *Woodward v. Ins. Co.*, 32 Hun, 365.

Q. A took out a policy of fire insurance in the X Company on his dwelling house. In the policy was a provision "that this entire policy shall be void if any change take place in the title or possession of the subject of insurance." After the issuance of the policy A executed and delivered to B a deed of the property which was absolute in form, but in fact was given to secure a debt. A remained in possession and the deed was recorded. Thereafter a fire occurred damaging the building. The company refuses to pay on account of the deed to B. A brings suit against the company. Who should have judgment and why?

A. Judgment for A. "A deed absolute in form but in fact given simply as security for a debt, does not convey the title, but is, both at law and in equity, a mortgage only. Where therefore a policy of fire insurance contained a condition to the effect that a sale or transfer of the property insured or any change in the title without the consent of the company would avoid the policy, held that a deed of the property, executed simply to secure a debt, was not within the condition and did not affect the policy." *Barry v. Ins. Co.*, 110 N. Y. 1.

Q. A takes out a policy of fire insurance in the X Insurance Company. There was a clause in the policy which read that if the insured property was incumbered in any way, this policy shall be null and void. After the issuance of the policy, judgment was rendered against A, which was the result of a decision in a contested suit. The building which was insured is subsequently destroyed by fire, and A presents his claim to the company which refuses to pay the same. A brings suit. Can he recover?

A. Yes. "A condition in a policy of fire insurance, forfeiting it in case the property insured becomes incumbered in any way, without the consent of the company written on the policy, refers to incumbrances created by the act of the insured; it does not apply to incumbrances by judgment, or otherwise created by operation of law." *Baley v. Ins. Co.*, 80 N. Y. 21; *Steen v. Ins. Co.*, 89 N. Y. 327.

(NOTE.) In *Egan v. Ins. Co.*, 5 Denio, 326, the policy declared that if the insured *should suffer a judgment* which shall be a lien on the insured premises, without communicating it to the company, the policy should be void. It was held that the provision was an express warranty, and judgment having been rendered against the insured, the policy was avoided.

Q. A takes out a policy of fire insurance upon his building in the X Insurance Company. The policy contained a clause, to the effect that if the property be incumbered by judgment or legal process, the policy should be avoided. A mechanic's lien, without procurement of A, was filed against the building. Shortly after, the building is destroyed by fire. The company refuses to pay the loss. What are the rights of the parties?

A. A can recover the amount of the loss. "A condition in a fire insurance policy, that the insured shall not be liable for a loss, if without the consent of the company, the property shall in any way become incumbered, applies only to incumbrances created by or with the consent of the insured, and to the creation of which he might apply for consent. A mechanic's lien filed against the property, without his procurement, does not avoid the policy, and is not an incumbrance con-

templated by the condition." *Green v. Ins. Co.*, 82 N. Y. 517.

(NOTE.) "A sale of real property upon execution does not, before the expiration of the period allowed for redemption, avoid a policy of fire insurance upon real property, under a condition that the policy shall be void, if any change take place in the interest, title or possession of the subject of the insurance, whether by legal process or judgment, or by voluntary act of the insured or otherwise." *Wood v. Ins. Co.*, 149 N. Y. 342.

Q. A takes out a policy of life insurance, and makes B, his wife, the beneficiary. In the application is the following question: "Are you married, and if so, to whom?" He answers yes, to B, and warrants that his answers are true. The policy contains a clause that if there are any false statements in the application, the policy shall be void. At the time B is merely living with A as his mistress, and is in fact the wife of another man still living. A dies. The company refuses to pay the amount of the policy. B brings suit. Can she recover?

A. No. This is a breach of warranty. The statements in the application which were made warranties were untrue, and this avoided the policy, even though they were made in good faith, and with a belief of their truth. The word "false" in the policy was used in the sense of untrue, and did not limit the effect of the warranty to a statement intentionally untrue. *Foot v. Ins. Co.*, 61 N. Y. 571.

(NOTE.) Answers to questions propounded by insurers in an application for insurance, unless they are clearly shown by the form of the contract, to be intended by both parties to be warranties, to be strictly and literally complied with, are to be considered as representations, as to which substantial truth in everything material to the risk, is all that is required of the applicant. Where a policy of life insurance is issued upon an application, in which a warranty is understandingly and clearly given by the insured, he will be held strictly to his contract, however immaterial the facts may be. To avoid a policy of life insurance upon the ground of misrepresentation, it must, in the absence of fraud, be in respect to some circumstance or fact material to the contract, and by which the insurer is induced to take the risk. A warranty, however, must be literally true, whether the fact warranted be material or not. *Bartean v. Ins. Co.*, 67 N. Y. 595; *Dwight v. Ins. Co.*, 103 N. Y. 341.

Q. A takes out a policy of life insurance and warrants his

Errata, page 274 and page 275

The answers to questions on pages 274 and 275 state the common-law rule. The statute (sec. 58 of the Insurance Law) has worked a change in the law. This section provides as follows: "Every policy of insurance issued or delivered within the state on or after the first day of January, 1907 by any life insurance corporation doing business within the state shall contain the entire contract between the parties and nothing shall be incorporated therein by reference to any constitution, by-laws, rules, application or other writings unless the same are indorsed upon or attached to the policy when issued; and all statements purporting to be made by the insured shall in the absence of fraud be deemed representations and not warranties. Any waiver of the provisions of this section shall be void." The statute has mitigated the rigor of the common-law rule in this respect that all statements are now considered as representations which do not avoid the policy in the absence of fraud, and all such statements or representations must be incorporated in the policy so as to form part of the contract of insurance. The recent case of *Archer v. Equitable Life Ass. Soc.*, 169 App. Div. 43, is called attention to. It was there held that: "In an action by a beneficiary to recover upon a life insurance policy, evidence of false representations on the part of the insured in procuring the issuance of the policy are inadmissible in defense, where such representations were not indorsed upon or attached to the policy as required by sec. 58 of the Insurance Law." In the opinion of the Court, it is further said: "The appellant contends that the purpose of this section was merely to abolish the distinction between warranties and representations, and to require that the entire contract shall be contained in the policy and the papers attached thereto. But it is quite evident that the legislature had in mind an additional purpose, which was to prevent, so far as could be, controversies which had theretofore arisen between the insured and insurer as to the accuracy of the record of statements made by the former at the time the policy was applied for. . . . The legislative intent, as expressed in the section, seems to me clear. It is to require insurance companies, when issuing policies, to set out therein the entire contract of insurance, and every statement or representation which induced the company to enter into the agreement, and upon which it relied in so doing, if thereafter to be available as a defense to the policy, is to be annexed to and made a part of it." The same rule was also enunciated in the case of *Mees v. Pittsburgh Life & Trust Co.*, 169 App. Div. 86.

company, if the insured should die by suicide. All of the conditions in the policy were fulfilled by the insured in payment of premiums, etc. The insured intentionally took his own

Q. A takes out a policy of life insurance and warrants his age to be fifty, when in fact he was fifty-five. A dies. What are the rights of his representatives against the company?

A. They have no rights whatever against the company. The answers contained in the application were warranties and were material to the risk, and therefore the statements being false, the policy was avoided. *Schmitt v. Ins. Co.*, 84 Hun, 128; *Kabok v. Ins. Co.*, 4 N. Y. Suppl. 718.

Q. A took out a policy of life insurance and warranted his age to be thirty years when in fact he was thirty-five years old. The agent who took out the policy for the company knew that A was thirty-five years of age and the falsity of the warranty. The insured having died, the company contests the policy. Upon the above facts, who should have judgment and why?

A. Judgment for the company. There was a breach of warranty by the insured and the fact that the agent had knowledge or information of the falsity of the statements does not affect the right of the company to assert the defense. "The cases in which knowledge of the agent through whom insurance is taken, may operate to defeat the right of the company to avail itself of the fact so known, at the time it is taken, are those in which there is no application signed by the insured stating to the contrary of such existing fact, but rests upon a condition expressed in the policy merely. Such is not understood to be the rule when the alleged breach of warranty is founded upon a misstatement by the assured in the application made and subscribed by him." *Kenyon v. Assn.*, 122 N. Y. 257; *Hamilton v. Assn.*, 27 App. Div. 480.

Q. A took out a policy of insurance upon his life, payable to himself, his executors, administrators or assigns. The policy was silent upon the question of liability of the insurance company, if the insured should die by suicide. All of the conditions in the policy were fulfilled by the insured in payment of premiums, etc. The insured intentionally took his own

life while he was sane. State whether or not the insurance company is liable. Give reasons.

A. The company is liable. "Where life insurance is effected for the benefit of one's representatives, suicide, while sane, is not a defense, in the absence of a condition or exception to that effect in the policy. The representatives are not bound by the acts of the deceased after the issuance of the policy, unless in violation of some condition thereof." *Fitch v. Ins. Co.*, 59 N. Y. 557.

Q. A takes out a policy of life insurance payable to his wife and children. The policy provides that it shall be void if the insured die by his own hand. A commits suicide while insane. Can his beneficiaries recover on the policy?

A. Yes. "Where a policy of life insurance contains the usual conditions declaring it void in case the insured should die by his own hand, the only exception to the condition is where self-destruction is clearly shown to be accidental or involuntary; to take a case out of the proviso on the ground of insanity the insured must have been so mentally disordered as not to understand that the act he committed would cause his death, or he must have committed it under the influence of some insane impulse which he could not resist." *Van Zandt v. Ins. Co.*, 55 N. Y. 169; *Newton v. Ins. Co.*, 76 N. Y. 426.

Q. A takes out a policy upon his life for the benefit of his wife and children. The policy provides that it shall be void if the insured die by his own act, whether voluntary or otherwise. A by mistake, took some poison which caused his death. Upon the refusal of the company to pay the policy, on account of the above condition, the representatives of A bring suit. Can they recover?

A. Yes. "A purely accidental act committed by a sane person, with no idea of injuring himself, cannot be regarded as an act of self-destruction, within the meaning of such a contract. Suicide is the act stipulated against. The words

voluntary or otherwise preclude the parties claiming under the policy if the act was one of suicide. But still it must be a suicide, and who would contend that the taking of poison by mistake, or any other act by which a sane person might innocently commit, though it should result in death, was what is ordinarily understood as self-destruction or suicide? It is unreasonable to suppose that one effecting an insurance upon his life, in stipulating against death by his own hand or act, could intend to embrace such a casualty, or that the insurance company could fairly expect him so to understand." *Rapallo, J., in Penfold v. Ins. Co.*, 85 N. Y. 317.

Q. A took out a policy of accident insurance. The policy provided that if the insured met death, it must be by external and violent means. A met death by inhalation of illuminating gas. The company refuses to pay the policy, claiming that the death did not come within the above provision of the policy. The representatives of A bring suit against the company to recover the amount of the policy. Judgment for whom and why?

A. Judgment for A's representatives. "As to the point raised by the appellant that the death was not caused by external and violent means, within the meaning of the policy, we think it is a sufficient answer that the gas in the atmosphere, as an external cause, was a violent agency, in the sense that it worked upon the intestate so as to cause his death. That a death is the result of accident, or is unnatural, imports an external or violent agency as the cause." *Gray, J., in Paul v. Ins. Co.*, 112 N. Y. 472.

Q. A took out a policy of life insurance for the benefit of his wife. The policy contained a provision that if the insured should die by anything accidentally taken, administered or inhaled, the company should not be liable. A, while stopping at the X Hotel, through a mistake of the porter who left the gas jet open, lost his life by inhaling the escaping gas. A's widow demands the amount of the policy, but the insurance

company refuses to pay same, on account of the above provision. She brings suit. Judgment for whom and why?

A. Judgment for the widow. "The respondent, however, urges that upon the admitted facts, the General Term held that the provision in reference to 'anything accidentally taken, administered or inhaled,' excepted the company from any liability whatever under its policy. We think otherwise. That provision in the policy clearly implies voluntary action on the part of the insured or some other person. The insured must take or inhale, or another must administer. The manifest purpose of the provision is to exempt the insurer from liability when the insured has voluntarily and consciously, but accidentally taken or inhaled, or something has been voluntarily administered which was injurious or destructive to life. We think that the particular accidents intended to be exempted by that provision are the accidental taking or inhaling into the system of some injurious or destructive agency under the mistaken belief that it was beneficial, or at least harmless." *Martin, J., in Menneiley v. Assn. Co.*, 148 N. Y. 596.

Q. A, the wife of B, secures a policy of insurance on his life, payable in ten years to herself in case she lives, and in case she dies before her husband, to be paid to her husband. In case she outlives her husband, to be paid to her children, share and share alike. One year after the issuance of the policy, A and B make an assignment of the policy to D. The insurance company at the end of ten years pays to the assignee of A and B. At that time A is living with her three children. The children, through a guardian, bring suit against the insurance company to enforce their rights under the policy. What are their rights, and was the assignment valid? Who should have judgment?

A. Judgment for the insurance company. The policy was payable to A, if she were alive, and she having assigned her rights to D, he acquired and possessed the same rights as she would have under the policy. The children therefore have no rights; whatever rights they had was cut off by the assignment.

The assignment was valid. "An assignment of a life insurance policy, issued upon the life of a husband, in which his wife is the beneficiary, is valid, where the assignment is made by the wife with the written consent of the husband." *Fuller v. Kent*, 13 App. Div. 529; *Miller v. Campbell*, 140 N. Y. 457.

Q. There is an insurance upon the life of A, payable to his wife, or if she be dead, to the children. They have two children, X and Y. X dies leaving a son, then A's wife dies, then A dies. Who is entitled to recover the amount of the policy?

A. Y gets all. X simply had a contingent interest in the policy, which terminated upon the happening of the contingency, i. e., her death prior to that of her mother, and so no interest was transmitted to her representatives. Upon the death of the mother, all interest in the policy vested at once in the child then living. *Walsh v. Ins. Co.*, 133 N. Y. 408.

Q. A took out a policy of insurance upon his life for the benefit of his wife. After the policy had been running for several years, A was unable to pay the premiums thereon and requested the insurance company to take a surrender of the policy which was done without any notice to the wife. At A's death, the wife demands the payment of the policy, when she is informed that the same has been surrendered. She comes to you for advice. What would you advise her?

A. The wife can recover the amount of the policy as she had a vested interest in the policy at the moment of its delivery to her husband. As the policy was taken out for the benefit of the wife, it could not be surrendered without her consent. In order to have a valid surrender, it must be with the consent of the beneficiary. *Whitehead v. Ins. Co.*, 102 N. Y. 143; *Shipman v. Home Circle*, 174 N. Y. 398; *Bradshaw v. Ins. Co.*, 205 N. Y. 470.

Q. A takes out a fire insurance policy. The policy reads that if A has any other insurance on his premises, the policy is void. A has a policy existing in the same company. His barn

burns, and he sues the company who defend on the ground that the policy was avoided by the violation of the above provision. Can he recover?

A. Yes, for the company must be deemed to have waived the condition. "Where the facts are all known, before any contract is made, a condition against a state of things known or presumed to be known to exist by all parties, cannot be deemed to be within their intention and purpose." *Forward v. Ins. Co.*, 142 N. Y. 382. "The company is estopped from setting up the forfeiture, since it is presumed to know of the existence of the other policy in its own company." *Kelly v. Ins. Co.*, 15 App. Div. 220.

Q. A policy of fire insurance contained a clause that the insured should serve a verified proof of loss upon the company within sixty days after the fire, as a condition precedent to his maintaining an action thereon. The insured served an unverified proof of loss within sixty days, which the company retained, making thereto no reply or observation. Upon the refusal of the company to pay, A brings suit. Judgment for whom and why?

A. Judgment for A. "Under the facts disclosed by the evidence, the defendant was called upon to object to the proofs of loss that were furnished within a reasonable time, to point out the defects, to the end that the plaintiff might remedy them within the period of time in which he was permitted to lodge with the defendants formal proofs; and a question of fact was presented to the jury to consider whether under all the circumstances, the defendant had not waived the right to insist upon more formal proofs." *Messmer v. Ins. Co.*, 24 App. Div. 214. In the case put, the act of the company was clearly a waiver of forfeiture. By accepting the formal proofs, they are estopped from demanding service of the verified proof of loss. *Bumstead v. Ins. Co.*, 12 N. Y. 81.

Q. Sparks from the locomotive of a railroad company burn the barn of B; B is insured and the insurance company pays him

the full amount of the insurance, \$1,000. B sues the railroad company in tort for damages. The railroad company demurs on the ground that the insurance company has brought an action for the same cause. Judgment for whom and why?

A. Judgment for the railroad company. The owner can only recover his loss from one party—having been paid by the insurance company, he cannot recover from the railroad. The insurance company, however, can recover from the railroad company upon the principle of subrogation. “If a loss under a policy of fire insurance is occasioned by the wrongful act of a third person, the insurer upon payment is subrogated to the rights and remedies of the insured and may maintain an action against the wrongdoer.” *Ins. Co. v. R. R. Co.*, 73 N. Y. 399.

Q. A has a policy of fire insurance for \$5,000. The insured property is mortgaged to B for \$5,000, and in the policy is this clause: “Damage, if any, payable to the mortgagee to the extent of his interest.” As a result of a fire, the insurance company becomes liable for \$4,000, but because of the above clause in the policy, are undecided as to whom to pay the money, so they refuse to pay to either. Who may bring suit?

A. Suit may be brought by either A or B, on the principle that either a beneficiary or the promisee may sue on the contract. *Lawrence v. Fox*, 20 N. Y. 268.

CHAPTER XII

Partnership

Q. A and B are copartners. They employ C as a manager of their business, and agree to give him 15% of the profits of the business as his salary. Subsequently X sells a bill of goods to the firm and upon their failure to pay for the same sues C, claiming that A, B and C are partners. Can he recover? State your reasons.

A. No. One who has no interest in the capital or business of a firm, save that he is to receive a percentage of the net profits of the business for his services, is not a partner with the others interested in the profits. *Smith v. Bodine*, 74 N. Y. 30; *Cassidy v. Hall*, 97 N. Y. 159.

Q. A, B and C run stage coaches over a route divided in three sections, each paying his own expenses for his own section, but the money received as fare of passengers, deducting therefrom the tolls paid, was divided among the parties in proportion to the number of miles run by each. B, in the course of one of his trips, negligently ran his coach against the carriage of D who was rightfully in the highway and without any fault, by which D was thrown from his carriage and received severe injuries. D brought an action to recover damages for the personal injuries received, not only against B, but also against A and C on the ground that all three were partners. The complaint alleges all these facts. A and C appeared separately and each demurred to the complaint. Judgment for whom and why? Give reasons.

A. Judgment for D. On these facts, in the case of *Champion v. Bostwick*, 18 Wend. 175, it was held that they were jointly liable as partners, and it was said that to constitute one a partner,

he must have such an interest in the profits as to entitle him to an account, and give him a specific lien or preference in payment over other creditors. See also *M. B. Co. v. Sears*, 45 N. Y. 797.

Q. A leases a hotel to B at a rental of \$1,000 a year and one-half of the profits of the hotel. C, knowing nothing about the relation existing between A and B, delivers goods to B which were not paid for. C, learning of the relation, brings an action and seeks to charge A as a partner. Can he succeed?

A. No. It is well settled that a lease of real or personal property at a rental to be measured by a share of the profits, does not make the lessor a partner, from the lack of an intention of the parties to form a partnership. *Taylor v. Bradley*, 39 N. Y. 129.

Q. A and B enter into an agreement, whereby A is to stock his farm and B is to carry it on, furnishing all the labor for one year. A and B are then to divide the crop. B hires C to aid him in carrying on the work of the farm. C sues A for the value of his services, claiming that A and B are partners. Can he recover? What relation exists between A and B?

A. C cannot recover from A. This is the familiar case of working a farm on shares. The relation existing between A and B is not that of partners, but that of tenants in common of the crop. *Davis v. Morris*, 36 N. Y. 569; *Farmer v. Hills*, 44 Barb. 428; *Putnam v. Wise*, 1 Hill, 234.

Q. A loans money to the firm of B and C, and takes a mortgage on their property, on which he is to receive interest and a stipulated share of the profits. B and C agree to repay the money in five years, the term fixed for the duration of the partnership. D sells goods to the firm, and in default of payment, sues A, seeking to hold him liable as a partner. Can he recover? State your reasons.

A. No. "Where a person, who has no interest in the firm or capital invested, lends money to the firm, for which he takes

a mortgage on property, and is to receive interest and a guaranteed share of the profits, and which loan the borrowers personally agree to pay in any event, he is not a partner, and cannot be held liable as such by the creditors of the firm." *Curry v. Fowler*, 87 N. Y. 33.

Q. H loaned to the firm of A and B \$2,000, in its business for one year, under an agreement that he was to receive one-third of the profits, and if at the end of the year he did not decide to become a partner, he was to be repaid his money out of the concern. H never received anything by way of interest for his investment and never interfered in the affairs of the firm or exercised any control. During that time L sold and delivered to the firm goods which were used in its business, of the value of \$1,000. They were not paid for, and L brought an action to recover therefor and made H a party defendant with A and B. H defends on the ground that he was not a partner. What should be the decision and why?

A. H is liable as a partner to the creditors of the firm. The money he invested was used by the firm for his benefit, he had an interest in the profits as such, not as a measure of compensation. In *Leggett v. Hyde*, 58 N. Y. 272, which is exactly in point, it was so held. The court by Folger, J., there said: "that the specific interest in profits which is to make a person a partner, must be a proprietary interest therein, existing before the division of them into shares. The test of partnership is a community of profits; a specific interest in the profits as profits, in contradistinction to a stipulated portion of the profits as a compensation for services." This rule has always been adhered to and applied or recognized by the courts of this state in the cases coming before them. *Burnett v. Snyder*, 81 N. Y. 555; *Hackett v. Stanley*, 115 N. Y. 631; *Moscowitz v. Sassulsky*, 141 App. Div. 764; *Admiral Realty Co. v. City of New York*, 206 N. Y. 147.

(NOTE.) "A person who has no interest in the business of a firm, save that he is to receive a share of the profits as compensation for services, or for money loaned for the benefit of the business, is not a partner, and cannot

be held liable by the creditors of the firm." *Richardson v. Hughitt*, 76 N. Y. 55. "An agreement between two parties to enter into a joint venture in the purchase or sale of stocks or other property is a very common transaction. The fact that one of them may have advanced the capital and the other has agreed that in consideration of such advance, he should participate more largely in the profits, does not convert such an agreement into a loan of money. The contract is still one of partnership." *Orvis v. Curtiss*, 157 N. Y. 657. The test as to what constitutes a partnership has varied greatly in the New York decisions. It can be said that the mere sharing of profits and losses does not constitute a partnership. Whether or not a partnership has been formed depends very largely on the intention of the parties. In *Magovern v. Robertson*, 116 N. Y. 61, it was said that: "Persons having a proprietary interest in a business and its profits are liable as partners." The rule laid down in *Leggett v. Hyde*, *supra*, seems to be followed in the most recent decisions.

Q. A loans B certain machines for use in B's manufacturing establishment, stipulating that he is to receive one-third of the profits of the business for the loan. B contracts certain debts, and his creditors seek to hold A liable as a partner. Can they do so?

A. No. "A person is not to be regarded as a partner even as to third persons, merely because he stipulates that in return for the hire of a chattel, he was to receive a part of the profits that might be earned by the use of the chattel in the bailee's business." *Wilson v. Bowker*, 27 Abb. N. C. 153.

Q. A and B were partners in the shoe business. A died and left a will by which he directed his executors therein named to conduct his interest in the business in the firm name in conjunction with the surviving partners. X subsequently sells goods to the firm, and seeks to hold the separate estate of A for their value. Can he do so?

A. No. "The executor became a copartner in the firm business, and debts incurred in the business were claims upon the partnership merely, and not upon the separate estate of the deceased partner. The intention of a testator to confer power to continue a trade or business must be clearly expressed in the will. When the simple power is conferred, it only au-

thorizes the use of the fund invested in the business at the time of the testator's death; the general assets may not be used, unless such an intent on the part of the testator is expressed in the will." *Willis v. Sharp*, 113 N. Y. 586. See also *Columbia Watch Co. v. Hodenpyl*, 135 N. Y. 430.

Q. A holds himself out to be a partner of B and C, which he is not. D gives credit to the firm without knowing anything of A's partnership. State A's liability generally to the creditors of the firm, and is he liable to D?

A. A is not liable to D, because the latter did not rely on the holding out. A is merely a partner by estoppel, and as such is only liable to those who have dealt with the firm in the belief that he was a partner. "A person who is not actually a partner may render himself liable as though he were one, by so conducting himself as to reasonably induce third persons to believe that he is a partner and to act upon that belief. It is the case in which the principle of estoppel applies. First, the alleged act of holding out must have been done by him or by his consent. Second, it must have been known by the person seeking to avail himself of it." *Meechem on Partnership*, sec. 69. "Declarations made by a person that he is interested in a certain business, not only estop him from denying his partnership therein as against those who have sold goods to the alleged firm on the faith of his declarations, but are also competent evidence of the existence of a partnership in favor of others as to whom there may have been no estoppel." *Griffin v. Carr*, 21 App. Div. 51, aff'd in 165 N. Y. 621. "A person not actually a partner may render himself liable as one by inducing people to act upon the faith of representations by him that he is a partner, the principle being that of estoppel. The holding out must antedate the contract, and the plaintiff's knowledge of and reliance upon his alleged connection must be proved as of that time, for otherwise the plaintiff was not misled. No particular mode of holding out is necessary. If he knowingly consents to be represented as a partner he is liable; and his knowledge and consent may be inferred from circumstances." *Bates on Part-*

nership, secs. 90, 91; Conklin v. Barton, 43 Barb. 435; Bank v. Walker, 66 N. Y. 424; Elmira Co. v. Harris, 124 N. Y. 280; Whitney v. Wardell, 78 Hun, 609; Taylor v. Meyer, 47 App. Div. 455.

Q. John Brown agrees with Jones and Smith, who are the actual partners in the firm of Brown, Jones & Co., for \$2,000 a year to allow his name to be used as a member of the firm. The object of this arrangement was to continue the firm name, Samuel Brown of the original firm having died. X sells goods to the firm, not knowing who was represented by the name of Brown. Subsequently having discovered the fact and the firm having defaulted in payment, he seeks to hold Brown as a partner. Can he succeed? State your reasons.

A. Yes. "One, who for a valuable consideration, authorizes the use of his name in a partnership as if he was a member thereof is liable as a partner to a subsequent creditor of the firm, and this, although the creditor was ignorant of the arrangement, or that the same represented such nominal partner, and did not give credit on the faith of his apparent connection with the firm." Poillon v. Secor, 61 N. Y. 456. "Where one is held forth to the world as a partner by his authority, consent or connivance, the presumption is almost absolute that he was so held out to every creditor or customer. If so held out by his own negligence only, he should be held only to a creditor who has been actually misled thereby." Parsons on Partnership, sec. 119; Ludowieg v. Talcott, 47 Misc. 83.

Q. A solvent partnership consisting of two partners owns real estate. One of the partners dies. His widow claims to be entitled to dower on one-half of the partnership realty. Is she so entitled? What are her rights?

A. She is entitled to dower, subject to the rights of the partnership creditors and the claims of the copartners between themselves. "Real estate purchased by a partnership firm for partnership purposes with partnership funds, is regarded in equity, so far as the firm and its creditors are concerned, as

personal property. . . . After the dissolution of the firm and the claims of its creditors are discharged, and the equities of the respective partners in its assets are determined and satisfied, such property, so far as it is preserved in specie, and is awarded and conveyed to the respective members, undoubtedly loses its character of personal property, and again becomes subject to the rules governing the devolution of real estate. But so long as the partnership affairs remain unsettled, like all the other assets of the firm, its real estate is equitably pledged to creditors, and liable to be disposed of and absorbed in the process of liquidating the firm debts and satisfying the claims of the respective partners as against each other." *Greenwood v. Marvin*, 111 N. Y. 433; *Simpson v. Simpson*, 41 App. Div. 451.

Q. A, B and C are partners. B has the legal title to certain real property bought with partnership funds and used for partnership purposes. B dies leaving a widow and an heir-at-law. What are the rights of the parties? State the general rule.

A. The widow is entitled to dower, and the heir-at-law to the remainder of B's share after payment of the partnership debts and the adjustment of the partnership accounts. B's share was one-third, notwithstanding the title to the whole property was in his name. "For the purpose of paying the debts of the firm and discharging the claims and the equities of the copartners between themselves, real estate belonging to the firm is treated in equity as personal property, and thus, although the title stands in the name of one of the partners only, he holds it in trust for the firm." *Tarbel v. Bradley*, 7 Abb. N. C. 273. "Real estate purchased for and appropriated to partnership purposes and paid for out of partnership funds is partnership property, although the legal title is taken in the name of one of the partners; equity will hold him as trustee for the firm. There is no distinction in respect to the proof necessary to establish the fact that the real estate is partnership property, between such a case and the case of a conveyance to the several partners; it may be established in either case by

parol evidence. For the purpose of paying debts and adjusting the equities between the copartners, real estate belonging to a partnership is considered as personal property, and what remains is regarded as real estate descending to the heirs of the partners according to their several interests." *Fairchild v. Fairchild*, 64 N. Y. 471. "On the death of either partner where the title is vested in both, the share of the land standing in the name of the deceased partner descends as real estate to his heirs, subject to the equities of the surviving partners to have it appropriated to accomplish the trust to which it was primarily subjected. The portion of the land not required for partnership equities retains its character as realty, and it leaves the law of inheritance and descent to their ordinary operation." *Darrow v. Calkins*, 154 N. Y. 503.

Q. A and B are partners in a firm in which part of the assets is real estate. About a month before the time fixed for the expiration of the partnership by the articles of copartnership, A brings an action for the partition of the real estate. There has been no accounting. Can A succeed in the action? Give reasons.

A. No. In the absence of any accounting between the copartners or adjustment of the copartnership accounts, the real estate cannot be separated from the rest of the copartnership property, and made the subject of a separate action in partition to divide the same or the proceeds thereof between the parties. *McFarlane v. McFarlane*, 82 Hun, 238.

Q. A and B are partners in the business of manufacturing hats. A sells and conveys his interest in the firm to C. What effect has the transfer upon the partnership? What rights does C, the purchaser, acquire?

A. The transfer dissolves the firm, and as a partner's interest is merely a chose in action, the purchaser thereof acquires the right of a partner to an accounting and a share of the assets which may be then found to be due him. "An assignment by one partner in the share of the common stock, simply transfers

the interest he may have in any surplus remaining after the payment of the firm's debts and the settlement of all accounts; nor can the partnership effects be taken by an attachment or sold on execution to satisfy a creditor of one of the partners, except to the extent of such interest. The remaining partners are entitled to the control of the firm property and to apply it to the payment of its debts. Where a partner sells his interest to a stranger or it is sold upon execution against him, his right to have partnership debts paid and his liability therefor discharged out of the property, is not divested by the sale." *Menagh v. Whitwell*, 52 N. Y. 146; *Moulton v. Ins. Co.*, 25 App. Div. 280; *Wood v. Ins. Co.*, 149 N. Y. 385.

Q. A and B are copartners in the clothing business. They purchase certain goods of C on sixty days' credit and failed to pay at the expiration of that time. C's attorney brings an action against A and B, but only serves the summons on A. B is financially irresponsible and has fled the state. Against whom should judgment be entered, and how should the execution be issued?

A. Judgment should be entered against A and B; it should, however, be stated that B was not served. Execution should be issued the same way. Section 1932 of the Code of Civ. Pro. provides as follows: "In an action wherein the complaint demands judgment for a sum of money against two or more defendants, alleged to be jointly indebted upon contract, if the summons be served upon one or more, but not upon all of the defendants, the plaintiff may proceed against the defendant or defendants upon whom it is served, unless the court otherwise directs; and if he recovers final judgment, it may be taken against all the defendants thus jointly indebted." Section 1934 says: "An execution upon such a judgment must be issued in form against all the defendants; but the attorney for the judgment creditor must indorse thereupon a direction to the sheriff containing the name of each defendant who was not summoned, and restricting the enforcement of the execution as prescribed in the next section." Section 1935 is in

part as follows: "An execution against property issued upon such a judgment, shall not be levied upon the sole property of such a defendant; but it may be collected out of personal property, owned by him, jointly with the other defendants, who were summoned, or with any one of them; and out of the real and personal property of the latter, or any one of them."

Q. A is a partner in the firm of A, B and C. Upon an individual judgment against A, an execution issues against A's interest in the firm. Thirty days later, an execution under a judgment against the firm is issued. There is not enough property to satisfy both executions in full. What disposition should be made of the firm property in reference to the executions?

A. The execution against the firm must be first satisfied for the full amount called for by it. "Where a sheriff receives for collection, an execution against one of the members of a copartnership, and by virtue thereof levies upon the interest of the judgment debtor in the goods of the firm, and where within thirty days after and before a sale, he receives an execution against all the members of the firm for a copartnership debt, the latter is the prior lien, and if upon the sale the stock brings sufficient to satisfy it, he is justified in returning the former execution *nulla bona*." Eighth Nat. Bank v. Fitch, 49 N. Y. 539.

Q. A, B and C enter into a partnership. A and B are both infants. The firm buys certain goods of X and fails to pay for them. X brings suit against the three members of the firm. A and B set up infancy as a defense. X only recovers judgment against C, and seeks to satisfy it out of the firm property. Can he do so?

A. Yes. Even though the contract of an infant is voidable, yet when he enters into a partnership he assumes a status, one of the incidents of that status being that the property of the firm is liable for its debts, and he cannot therefore be relieved from the operation of this rule by reason of his infancy.

Of course the separate property of the infant cannot be charged with the firm debts. "In an action against copartners for a partnership debt, where judgment is rendered in favor of two members of the firm, on the ground that the debt was contracted during their infancy, and against the remaining adult member: Held, that the judgment against the adult member of the firm was a partnership liability, so far as to make the moneys and property of the firm applicable to its payment." *Whittemore v. Elliot*, 7 Hun, 518.

Q. A and B were partners. A buys out B's interest and agrees to pay all the firm debts, giving B a bond binding himself to do so. X is a creditor of the firm, and sues A on the bond for the amount of his claim. A demurs. Judgment for whom and why?

A. Judgment for A. "Where upon the dissolution of the firm, one partner executes to another a bond conditioned for the payment by the partner executing it, of all the firm debts, the liability of the obligor is to the obligee only, not to the creditor, and an action cannot be maintained therefor by a firm creditor to recover his indebtedness from the obligor." *Merrill v. Green*, 55 N. Y. 270. See also *Serviss v. McDonnell*, 107 N. Y. 260.

Q. Upon the statement of the defendant Brown, that the firm of Brown and Jones intends to increase its capital stock, and that he, Brown, wishes to put in \$1,000 as his share of such increase, plaintiff loans Brown \$1,000 and takes two firm notes for \$500 each. He sues the firm upon the notes. What are the rights of the parties? What principle of law is involved?

A. The firm is not bound, as the facts show that the intention was to loan Brown individually. Of course, if the loan was made to the firm on Brown's application, the firm would be bound irrespective of the question whether or not they received the money, as a partner has implied power to borrow money for the firm; but as the loan was made to Brown in-

dividually, even though he would apply the money to the firm, the firm would not be bound. The statement that each wanted to increase the capital stock by \$1,000, shows clearly that the money was loaned to Brown individually. The presumption raised by the giving of the firm note is rebutted by the facts. "A note given by one of several partners in the name of a firm, is in itself presumptive evidence of a partnership debt; and if the other partners seek to avoid its payment, the burden of proof lies upon them to show that the note was given in a matter not relating to the partnership business, and that with the knowledge of the payee. All the members of a firm are liable for money lent to the firm upon the application of one of the partners, and it is not necessary to show the actual application of the money to the use of the firm, or the assent of the other members to such application thereof." *Whittaker v. Brown*, 16 Wend. 550.

Q. A, of the firm of A and B, goes to C and borrows from him \$500, giving therefor his individual note for that amount. A subsequently places the money in the firm. The note not being paid at maturity, C sues the firm. Can he recover? State your reasons.

A. No. "Where money is loaned upon the promissory note of one member of a copartnership and upon his individual credit, the fact that the money is applied to the use of the firm does not constitute the lender a creditor of the firm. It is only when the name used and to which credit is given, is that adopted by the firm and used to designate the partnership, that it is held liable." *Nat. Bank v. Thomas*, 47 N. Y. 15; *Williams v. Gillies*, 75 N. Y. 202.

(NOTE.) "A lender is warranted in assuming when nothing is said, that money borrowed by a partner is for the firm, but where the money is borrowed on the individual credit of the partner, though it is applied to the use of the firm, it does not thereby become an indebtedness of the firm. And the same rule applies where money comes to the hands of a partner through a transaction outside of the firm's business and is afterward applied to its use. So on the other hand, if money is borrowed or goods purchased for the firm, and upon its credit, the subsequent misappropriation of the avails by the

borrowing or purchasing partner, does not relieve the firm by its liability therefor." 17 Amer. & Eng. Ency. of Law, 1016.

Q. A, of the firm of A and B, buys certain goods for the partnership from X in his, A's, own name. X was ignorant of the existence of the partnership. The goods were applied to the use of the firm. Upon discovering the facts X sues the firm for the purchase price of the goods. Can the action be maintained? State your reasons.

A. Yes. Partners are all liable for goods furnished for the benefit of the firm, though the vendor does not know of the existence of the firm, and though he supposes himself dealing with, and gives credit to the individual partner by charging him alone in his books. The doctrine of undisclosed principal applies, each partner being the agent for the copartnership. *Reynolds v. Cleveland*, 4 Cowen, 282. Knowledge of the existence of the partnership at the time of the dealing is not essential if the partnership in fact exists and the dealings are concerning its business. *Ontario Bank v. Hennessy*, 48 N. Y. 545; *Cashman v. Lawson*, 73 App. Div. 419.

Q. A and B were partners in the shoe business. A went to C and purchased some furniture for which he gave his individual note indorsed by him in the partnership name. The furniture was shipped to A individually as directed. The firm had no knowledge that A had purchased the furniture, and C also knew that the firm was engaged in the shoe business exclusively. Upon maturity of the note, the same not being paid, C brings action against the firm upon the indorsement of the note. Can the action be maintained? Give reasons.

A. The firm is not liable. "Where a person takes a partnership security from one of the partners for what is known at the time to be a particular debt of the partner who gives the security, the copartnership is not liable. Where paper is signed by one partner in the name of the firm as sureties for a third, it carries on the face of it evidence that it was not given

for a partnership debt, and proof of that fact becomes unnecessary. But when it is signed or indorsed in the ordinary manner, such proof must be given. But when the fact is established that it was not given for a partnership debt, and that the person from whom it was passed knew it, no matter what the form of the instrument is, it does not bind the partners who do not assign or assent to it." *Laverty v. Burr*, 1 Wend. 529; *Vosburgh v. Diefendorf*, 119 N. Y. 357; *Smith v. Weston*, 159 N. Y. 194.

Q. A and B were copartners. B owed to X a personal debt, and in payment thereof, without the knowledge of A, B turned over to X \$10,000 of the assets of the firm. X acted in good faith, and had no knowledge at the time he was receiving copartnership property. A seeks to recover the money. How would you advise him to proceed?

A. The money can be recovered as the other partner did not consent to the payment irrespective of the knowledge of the one receiving it. Whatever moneys were paid were partnership moneys, the title thereto being in the partnership, since there had never been any dissolution of the partnership, accounting or other closing of the partnership existence. The cause of action to recover the money is in the partnership, therefore the action may be brought in the name of the firm or by the other partner in his own name; after attempting to obtain the consent of his copartner to join as plaintiff, and upon consent being refused he can join him as a defendant in the action, the reason therefor being stated in the complaint. Section 448 of Code of Civ. Pro.; *Baron v. Lakow*, 121 App. Div. 544.

Q. A, of the firm of A, B and C, makes a contract with M for partnership purposes. A is guilty of fraud in the making thereof. B and C are entirely ignorant of the matter. M sues A, B and C. What are the rights of the parties?

A. The firm is liable. "Where a fraud is perpetrated by one of the members of a partnership in the transaction and

prosecution of a partnership enterprise, they are all liable, although the others had no connection with, knowledge of, or participation in the fraud." *Chester v. Dickerson*, 54 N. Y. 1.

Q. A and B are partners. C agrees with B that if B will give him a firm contract, he, C, will pay him, B, \$1,000 for his sole benefit. B gives the contract to C and receives the money. A knows nothing of the private agreement between his partner and C. A now consults you as to his rights. What would you advise?

A. B can be compelled to account to the firm for the \$1,000. "Any rewards or commissions secretly obtained by one partner from third persons, for inducing his firm to make particular purchases or sales or to enter into particular transactions, must be accounted to the firm." *Dunlop v. Richards*, 2 E. D. Smith (N. Y.), 181. "The relation of partners with each other is one of trust and confidence. Each is the general agent of the firm, and so bound to act in entire good faith to the other. The functions, rights and duties of partners are similar to that of trustees and agents. Neither partner can, in the business and affairs of the firm, stipulate for private advantage to himself; he can neither sell to nor buy from the firm at a concealed profit to himself. Each advantage which he can obtain in the business of the firm must inure to the benefit of the firm." *Earl, J.*, in *Mitchell v. Reed*, 61 N. Y. 123.

Q. A and B entered into articles of copartnership which by the terms thereof the business was to continue for five years. After the business had been going for one year A brought an action against B wherein he sought to recover a share of the profit which B had secretly made on a certain partnership transaction which B endeavored to withhold from A his share of the profit thereof. In the complaint A did not ask for a dissolution of the copartnership. Can A maintain the action, and what effect has it upon the existence of the partnership? Answer fully.

A. The action may be maintained for an accounting with-

out a dissolution of the firm; as where a partner makes secret profits in a firm transaction and withholds them from his co-partner, equity recognizes the right of the injured partner to relief and compels the defrauding partner to account. And the accounting may be had without dissolution, as the sole object of the action is to enable the partner who was being defrauded to obtain his share of the partnership profits in an executed transaction from the benefit of which he has been excluded. *Traphagen v. Burt*, 67 N. Y. 30; *Sanger v. French*, 157 N. Y. 214.

(NOTE.) "A court of equity will not take cognizance of an action for an accounting as a mere incident to the settlement of a solitary matter in dispute between the partners when it is not vital to either party or to the business, and dissolution is not sought. The general rule is that a court of equity, in a suit by one partner against another, will not interfere in matters of internal regulation, except with a view to dissolve the partnership. One of the few exceptions to the rule is where one partner has sought to withhold from his copartner the profits arising from some secret transaction." *Lord v. Hull*, 178 N. Y. 9.

Q. A, B and C are partners in the butcher business. A has a grudge against M's dog for having annoyed his, A's, children. He throws some poisoned meat to the dog when he passes, and the dog dies from eating it. M brings action against the firm to recover damages. Can he recover? Give reasons in full.

A. The firm is not liable, as A's act was committed not in the course of the firm's business or for its benefit, but purely for his own personal reasons. "Each partner being the agent of the firm for the purpose of carrying on its business in the usual way, the partnership is liable in damages for torts or wrongs committed by any of the partners within the proper scope of their agency. While the willful and malicious torts of a member of a firm are usually not within the scope of his agency, and consequently do not render his copartners liable, yet if such an act is done clearly and plainly for the benefit of all and in the usual and ordinary prosecution of the business of the firm, all are liable, notwithstanding the malicious motive of the partner committing the act." 17 Amer. & Eng. Ency. of Law, 1065.

Q. A, one of the members of the firm of A, B and C, dies. What effect has this upon the firm, and have his administrators any right to act with the surviving members of the firm in the distribution of its assets?

A. The death of one of the members of a firm has the effect of terminating the partnership. The legal title of the assets belongs to the survivors, and they have the right to wind up the affairs of the partnership, subject to the equitable right of the representatives of the deceased partner to have them applied to the payment of the firm debts, and to the distribution of any surplus. *Williams v. Whedon*, 109 N. Y. 333; *Smith v. Fergerson*, 33 App. Div. 562; *Dickinson v. Powers*, 140 App. Div. 107.

Q. A and B were partners. A died. Thereafter B brought an action against C in his own name on a firm debt contracted before the death of A. C pleaded that there was a misjoinder of parties plaintiff, claiming that the personal representatives of A should have been joined in the action. What do you say as to the contention of C? Answer fully.

A. The contention of C cannot prevail as the surviving partner is the proper party to bring the action in his own name. "Upon the death of one partner, the demands and choses in action of the copartnership belong to the surviving partners, and they possess the sole and exclusive right to reduce them to possession. The law not only vests the legal title to the choses in action in the surviving partner, but it casts upon him the duty to get in the debts and settle the affairs of the partnership. The survivor of a firm is the real party in interest (under the Code) to a demand owed by or due to the firm. The debtor cannot, when sued by the survivor, object that the representatives of the deceased partner are not made parties with the survivor. The test is, was the demand at the time of the death of the copartner a copartnership demand? If it was, the survivor takes the legal title with its incidents, however limited his equitable interest may be, and notwithstanding on an accounting nothing might remain to him." *Andrews, J., in Daby v. Ericson*, 45 N. Y. 790; *Nehrboss v. Bliss*, 88 N. Y. 605.

Q. A and B were partners. The firm was in straitened circumstances. A, wishing to give to C, a creditor of the firm, preference, assigned to him all the firm property, the value of which amounted to the debt due to C. What are the rights of B and the firm creditors in the absence of the Bankruptcy Law?

A. They have no rights. "One partner has authority to sell and transfer all the partnership effects directly to a creditor of the firm in payment of a debt without the knowledge or consent of his copartner, although the latter is at the place of business of the firm and might be consulted. Nor is such transfer invalid though the firm is insolvent, and thereby one creditor acquires a preference over the other creditors of the firm." *Mabbett v. White*, 12 N. Y. 442. See also *Bender v. Hemstreet*, 34 N. Y. Suppl. 423, where it was held, that while a partner has the right to sell to a creditor, yet he has no such right to sell to a stranger.

Q. A and B are partners. After a time the partnership is dissolved and A carries on the business. A then gives a note in the firm name to C to extend the payment of a firm debt. C, who all the time has known of the above facts, now sues A and B as members of the firm on the note. Can he recover?

A. No. It is well settled, that one partner cannot bind the other after dissolution by a firm note, even for an old firm debt. This is the making of a new contract by one for all the partners, after his authority is revoked. During the continuance of the partnership, one partner is entitled to act for all as their general agent. On dissolution, he ceases to hold that character and must be considered as a mere joint debtor. *Bank v. Norton*, 1 Hill, 572.

(NOTE.) "A partnership and the authority of one member to bind the others by his acts continue, notwithstanding a formal dissolution, as to third persons acting in good faith and having no notice of dissolution." *Bank v. Weston*, 159 N. Y. 201.

Q. On January 2, 1908, A and B for value received, made and delivered to C their promissory note for \$500, payable in

three months. A and B were in partnership at that time. In May, 1913, A and B dissolved partnership. No further attention was paid to the note by either of the parties thereto, until January 2, 1915, when B paid to C all of the interest due and unpaid on the same, and \$100 on account of the principal, which C at once indorsed on the note as a payment thereon. C thereafter sues A and B on the note. A pleads the statute of limitations. On the above facts judgment for whom and why?

A. Judgment for A. After the dissolution of a partnership, an acknowledgment and payment by one of the partners will not revive a debt against the firm which is barred by the Statute of Limitations. *Van Keuren v. Parmelee*, 2 N. Y. 523; *Robbins v. Fuller*, 24 N. Y. 570. Of course B is liable, the payment by him having taken the case out of the statute, as far as he personally was concerned.

(NOTE.) "In *Forbes v. Garfield*, 32 Hun, 389, it was held that: "Where payments are made by one of several partners after the dissolution of a firm, upon a note given by the firm for goods sold to it, and such payments are received by the payee in ignorance of the fact that the firm is dissolved, such payments are to be treated as if made by the firm, and prevent the running of the Statute of Limitations in favor of the other members of the old firm."

Q. A and B are partners. The firm is dissolved by mutual consent. Notice of the dissolution is published in the newspapers. C, who has sold goods to the firm on credit before, sells goods to A who has continued the business, not knowing that the firm had been dissolved. Upon default in payment, he seeks to hold B liable as a partner. B defends on the ground that the firm had been dissolved and that notice of the dissolution was published in the newspapers. Judgment for whom and why?

A. Judgment for C. A retiring partner remains liable as a partner until proper notice of his withdrawal is given. This notice in the case of former dealers must be actual, and must be brought home to them. A mere publication in the newspapers is not sufficient. To one who is not a prior dealer,

constructive notice, as publication in a newspaper, is sufficient. One who has sold goods to a firm on credit, even though no definite time of forbearance is agreed upon, is a former dealer, but one who has sold for cash is not. *Clapp v. Rogers*, 12 N. Y. 283; *Bank v. Howard*, 35 N. Y. 500. "A retiring partner is liable for subsequent engagements made by his former copartner in the firm name with those who had previous dealings with the firm, and who entered into the new transaction without notice of the change of the firm. A person who is entitled to actual notice of the dissolution must be one who has had business relations with the firm, by which a credit is raised upon the faith of the copartnership. To relieve a retiring partner from subsequent transactions in the firm name, notice of the dissolution must be brought home to the person giving the credit to the partnership. Publication of notice of dissolution will not relieve a retiring partner from liability to one dealing previously with the firm, but will be sufficient as to others." *Andrews, J.*, in *Austin v. Holland*, 69 N. Y. 571, where it was held that the mailing of notice to a prior dealer, it never having reached him, was not sufficient. *Bank v. Herz*, 89 N. Y. 629; *Bank v. Weston*, 159 N. Y. 211.

Q. A and B were engaged in the coal business as partners under the firm name of A & Co. The firm entered into a valid contract with C for the sale of one thousand tons of coal to be delivered in lots of two hundred tons at a time. After the firm had delivered to C six hundred tons of coal under their contract with C, the firm was dissolved, B retiring from the firm and his place being taken by D, and thereafter the firm was continued by A and D under the same firm name, A & Co. Notice of the dissolution of the old firm and the formation of the new one was mailed to C but not received by him. The new firm ships part of the balance of the coal to C, but refuses to deliver all the coal specified in the original agreement. The firm brings action to recover for the coal already delivered. Can they recover?

A. No. "It is to be noticed that there is no evidence in the

case that the defendant ever made any contract whatever with the new firm for the purchase from it of any coal whatever, and the only request by defendant that it deliver any coal is that contained in the letter from which it is evident that he considered the W. H. P. & Co. to whom he was writing as the old firm and the defendant distinctly testified that he never received the notice of dissolution. It is apparent, therefore, that the coal for which plaintiffs seek to recover was never purchased from them by this defendant. Not only have plaintiffs been allowed to recover upon a contract that was never made with them but with an entirely different party (the old firm), and a judgment rendered in favor of these plaintiffs would not bar an action by the old firm for the same coal. This seems to be clear error for which this judgment should be reversed." Parker, P. J., in *Piper v. Seager*, 111 App. Div. 115.

Q. The firm of A and B have been dissolved by mutual consent. During the process of dissolution, A obtains certain promissory notes discounted and retains the money so obtained. B brings an action against him for conversion. Can the action be maintained?

A. No. In the absence of an accounting, one partner cannot sue the other at law, nor can one partner maintain an action against his copartner for a conversion of firm assets after a dissolution. *Arnold v. Arnold*, 90 N. Y. 580; *Smith v. Fitchett*, 56 Hun, 474; *Belanger v. Dana*, 52 Hun, 39.

Q. A and B entered into limited copartnership under the statute, each contributing \$50,000. A was the special partner and B the general one. The firm failed. State the liability of A and B respectively.

A. The special partner is only liable for the amount that he contributed to the firm, that is, the \$50,000. B would be liable for the entire debts of the partnership. Section 6 of the Partnership Law (Consolidated Laws, chap. 39) governs the liability of a general partner, and is as follows: "Every general partner is liable to third persons for all the obligations of the

partnership, jointly and severally with his general copartners." Section 7 of the Partnership Law (Consolidated Laws, chap. 39) governs the liability of a special partner, and is as follows: "A special partner, except as declared in this chapter, is liable for the obligations of the limited partnership only to the amount of the capital invested by him therein."

(NOTE.) In order to avail himself of the benefit of a special partner, the payment or the amount invested must be actually paid. "The immunity of a special or limited partner from general liability is founded upon the statute which clearly contemplates a payment in good faith, by the special partner of the contribution to the capital stock of the firm, specified in the certificate. Hence if it was not paid, and the statement in the certificate signed by all the partners and in the affidavit attached, was false, the statute was no protection to the one claiming the right or immunity of a special partner." *Hotopp v. Huber*, 160 N. Y. 528.

Q. A and B entered into a limited partnership agreement under the statute, which was filed, recorded and published, in which A was made the general partner and B the special or limited partner, with a capital of \$75,000 of which A contributed merchandise and accounts amounting to \$50,000, and B contributed merchandise and accounts amounting to \$25,000. The partnership failed with liabilities amounting to \$75,000. What is the liability of A and B respectively, for the debts of the firm? Answer fully.

A. Both are equally liable for the entire debt as general partners, for it is well settled under the Limited Partnership Act (sec. 30, Partnership Law, Consolidated Laws, chap. 44) that the contribution of capital by the special partner must be made in cash, and the payment in anything else will not satisfy the requirements of the statute. *Haviland v. Chase*, 39 Barb. 283; *Van Ingen v. Whitman*, 62 N. Y. 513; *Durant v. Abendroth*, 69 N. Y. 148; *Bank v. Sirrett*, 97 N. Y. 320. The statute defines special partners as those "who contribute in actual cash payments, a specified sum as capital, to the common stock."

CHAPTER XIII

Quasi Contracts

Q. A by written contract hires B to work for him for one year. At the end of three months, B leaves the employment without any cause. A refuses to pay for the services rendered. B brings action to recover the value of the services upon a quantum meruit. Can the action be maintained? State your reasons.

A. No. In this case the doctrine of unjust enrichment does not apply. *Marsh v. Ruleson*, 1 Wend. 514. "Where a servant on contract, without cause, goes away declaring that he will work no more, the master is not bound to receive him again, nor can the servant procure a pro rata compensation." *Lantry v. Parks*, 8 Cowen, 63. "Where a party enters into a contract and having performed part of it, without the consent of the master voluntarily abandons further performance of it, he cannot maintain an action for the labor actually performed. Where the contract is entire, a full performance is necessary to the plaintiff's right of action." *Jennings v. Camp*, 13 Johns. 94. These cases proceed upon the ground that the contracts were entire in the sense that full performance of the services contracted for was, by the agreement of the parties, to be made before anything became payable by the employer. The contract being entire, the entire performance is a condition precedent to a recovery for services rendered. *Smith v. Brady*, 17 N. Y. 185.

Q. A was employed by B at the rate of \$2,000 per annum, nothing more being mentioned. At the end of the first month, A left the employ of B without any cause, and demanded of B pay for the month, which was refused. A brings action against B to recover for the month's service to which B answers the

breach by A and his own readiness to perform. Under the above facts, who should have judgment and why?

A. Judgment for A. Where there is a hiring at so much a year and nothing more being said, this is considered as a hiring at will which may be terminated by either party at any time. The words "at so much a year" designates the rate of salary, but does not specify the time of hiring. *Hotchkiss v. Godkin*, 63 App. Div. 470; *Outerbridge v. Campbell*, 87 App. Div. 597; *Martin v. Ins. Co.*, 148 N. Y. 117.

Q. A is employed by B as a salesman for one year by written contract at \$3,000 per annum, payable in monthly installments. A, having violated B's instructions not to sell goods on consignment, is discharged after having worked for one month. He brings action for one month's salary. Can he recover?

A. Yes. The contract was not entire, but was separable to the extent of the monthly installments. "The rule deducible from these as well as from all the cases in this state that we have examined, is that even where a contract is made for a year, but there is provision for periodical payments during the time and the contract in its nature does not necessarily contemplate entire performance as a condition precedent to compensation, the servant when discharged for cause is entitled to recover the amount due for the month or his monthly wages as wages earned, subject to recoupment by the master for any damages suffered by him by reason of the neglect, unskillfulness or nonperformance of the servant." *O'Brien, J., in Walsh v. N. Y. & Ky. Co.*, 88 App. Div. 485; *Delmar v. Kinderhook Co.*, 134 App. Div. 560.

(NOTE.) "Where in a contract for work, labor and services there is an agreement to pay from time to time during the term, a recovery can be had for the wages earned, though the servant abandons the service, without cause, before the expiration of the term." *Mernagh v. Nichols*, 132 App. Div. 509.

Q. A is hired by B as a clerk by the month at a salary of \$100. A starts work on the first of the month and works until

the fifteenth when he is discharged by B without cause. A brings action for \$50 as wages due him. Was the action properly brought?

A. No. The action should not have been brought for wages, but for damages for breach of contract. Where during the month and before the salary becomes due and payable under the contract, an employee is discharged, no recovery in an action such as this can be had for the days in that month during which the services may have been performed, and for the reason that the contract is an entirety as to each month and recovery for any portion thereof could be had not in an action for wages, but only in an action for damages for breach of contract. Whether rightfully or wrongfully discharged, therefore, the cases hold that the employee's remedy would be not in a suit to obtain a proportionate amount of the month's salary as wages due, but rather in an action for breach of the contract therein to recover upon a quantum meruit. The causes of action are separate and distinct. *Arnold v. Adams*, 27 App. Div. 345; *Allen v. Creamery Co.*, 101 App. Div. 306; *Weed v. Burt*, 78 N. Y. 191; *Perry v. Dickerson*, 85 N. Y. 345.

Q. A hires B as managing engineer to supervise the construction of a certain railroad. After having worked six months, B becomes seriously ill, so as to be incapacitated from doing any further work. The contract provided that B was to work for one year for \$10,000. A refuses to pay for the work already performed. B brings suit to recover \$5,000 which he claims is due him. A sets up as a defense that the contract was entire, and alleges nonperformance. Judgment for whom and why? Give your reasons.

A. B can recover on a quantum meruit, and as this is a special contract could probably recover the proportionate amount of the contract price. B having been prevented from performing without any fault on his part, A would be unjustly enriched if he were not compelled to pay for the work already performed. "One, who under a contract requiring his personal services,

and providing for partial payment during the employment and the remainder at the end of the term, performs services valuable to the employer, but is, before the stipulated period, disabled by sickness from completing his contract, is entitled to recover as upon a quantum meruit for such services as he rendered." *Wolf v. Howes*, 20 N. Y. 197. "The compensation of an agent or servant employed under a special contract, a complete performance of which is prevented by his sickness or death, is not confined to a quantum meruit, but is to be measured by the contract." *Clark v. Gilbert*, 26 N. Y. 279.

Q. A hires B, an infant, to work for him in his grocery store at \$20 per month. After working two weeks, the boy becomes dissatisfied with the place and, without the knowledge of the employer, leaves in the nighttime and returns to his home. His father subsequently brings action for the services rendered. Can the action be maintained? Give your reasons in full.

A. Yes. The case of infants is an exception to the rule, that a servant who voluntarily leaves his position, cannot recover for the services already performed. "In an action by an infant to recover for work and labor, it is neither a defense nor a ground for reducing the damages, that the work was done under a contract by the infant to labor for a fixed period of time, which he violated by leaving the defendant's employ without cause before the time expired." *Whitmarsh v. Hall*, 3 Denio, 375.

Q. A, on December 1, 1913, hires B by verbal agreement to work for him for one year from January 1, 1914. B enters upon the employment and works for six months. A, not being satisfied with B's work, discharges him. B brings action to recover for the work performed. A defends that the contract is void under the Statute of Frauds. Judgment for whom and why?

A. Judgment for B. As A was unjustly enriched by the services of B, the latter can recover as upon a quantum meruit. The statute would be a good defense if the action was brought upon the contract, but here a recovery is allowed upon the

principle of quasi contract. "Where services are rendered under a contract void by the Statute of Frauds, no action can be maintained to recover their value, except upon the default of the other party or his refusal to go on with the contract. A party who refuses to go on with an agreement void by the Statute of Frauds, after having derived a benefit from part performance, must pay for what he has received. An implied promise to pay for part performance can arise only when the party sought to be charged has had the benefit of the part performance, and has himself refused to proceed, or otherwise prevented or waived full performance." *Galvin v. Prentice*, 45 N. Y. 162; *Thacher v. R. R. Co.*, 76 Misc. 61; *Day v. R. R. Co.*, 51 N. Y. 583.

Q. A who was an attorney and counselor at law, appeared and defended on behalf and at the request of B certain actions brought against him. A sent B a bill for \$500 for the said services. B refused to pay and A brings action for \$1,000. At the trial he offers to show that the services were actually worth \$1,000. Can he do so?

A. Yes. A was not concluded as to the value of his services by the bill rendered by him, as the amount was neither paid nor tendered. "Had the defendant paid the bill presented, it would have been an accord and satisfaction of the services, although less than their real value. But the defendant chose to litigate, and the question of the value of the services was open to proof as a question of fact." *Shankland, J., in Williams v. Glenny*, 16 N. Y. 389. See also *Shiland v. Loeb*, 58 App. Div. 565.

Q. Plaintiff, seeing fire spreading upon defendant's land during defendant's absence, hired men to put it out, and thereby saved defendant's house from destruction. He sues defendant for the money expended. What are the rights of the parties?

A. He cannot recover, for the services were purely gratuitous and the principle of unjust enrichment does not apply in such a case. "Labor or services voluntarily done or performed by

the plaintiff for the defendant without his privity or request, however meritorious or beneficial it may be to the defendant, as in saving his property from destruction by fire, affords no right of action." *Bartholomew v. Jackson*, 20 Johns. 28. See also *Ingraham v. Gilbert*, 20 Barb. 151; *Matter of Pinkerton*, 49 Misc. 370.

Q. A owed C \$500 on a note; A was away at the time of its maturity, having made no provision for its payment. B, who took a friendly interest in the affairs of A, without any request of A, paid the note when due, and C thereupon cancelled it. B honestly expected, when he made the payment, because of his friendly relations with A, that A would repay him therefor. When A returned, B informed him of the payment of his, A's note, for which A expressed his gratitude and promised to repay B. Upon A's failure to pay, B brings suit to recover the amount so paid for A's benefit. Can he recover?

A. The money having been paid by A without being requested to do so, was gratuitous and without consideration. The subsequent promise was based upon a past or executed consideration and therefore void, hence no recovery can be had. And the doctrine of unjust enrichment cannot be made to apply to a case like this. "An express promise, therefore, can only revive a precedent good consideration, which might have been enforced at law, but can give no original right of action, if the obligation upon which it is founded never could have been enforced." *Smith v. Ware*, 13 Johns. 258.

Q. A makes an agreement with B to purchase a piece of land from him for \$5,000. The agreement is verbal, but A pays to B \$500 to bind the bargain. On the next day, A becoming dissatisfied with his contract and receiving a more advantageous offer from a third party, demands the return of his \$500 from B. B comes to you for advice. What would you inform him are his rights?

A. B has a right to retain the \$500. A cannot invoke the principle of unjust enrichment in his favor, for he has himself

broken the contract; he cannot found a recovery upon his own breach. B has no right of action to compel specific performance, as the contract is void under the Statute of Frauds, being a contract for the sale of lands, which must be in writing; part payment does not take the case out of the statute. *Lawrence v. Miller*, 86 N. Y. 131. See also *Ketchum v. Evertson*, 13 Johns. 358; *Page v. McDonnell*, 55 N. Y. 299.

Q. A agrees with B to build a house for him and deliver the same completed by October 1, 1913. A performs most of the work, and the house is substantially completed by September 15, 1913, but has not been delivered into the possession of B, and on the 16th of September is destroyed by fire. B has already paid to A several installments of the price, amounting in all to \$1,000. On October 2, A not having delivered the house, B brings action to recover the money paid and also damages for nonperformance of the contract. Can the action be maintained? State your reasons.

A. Yes. This seems rather a harsh case, but recovery is allowed on the ground that A not having performed his contract by delivering the house, would be unjustly enriched by a retention of the money. "One who has agreed to build a house on the land of another, and has substantially performed his contract, but has not completely finished the house nor delivered it, when it is destroyed by fire, is liable to an action for money advanced upon the contract and damages for its nonperformance. Where a party engages unconditionally by express contract to do an act, performance is not excused by inevitable accident, or other unforeseen contingency not within his control." *Tompkins v. Dudley*, 25 N. Y. 272; *Ward v. H. R. Co.*, 125 N. Y. 230; *C. H. Realty Co. v. City of Albany*, 207 N. Y. 382.

Q. A agrees to do certain fresco painting in the house of B. He enters upon the work, and when it is about half finished, the building is destroyed by fire. A brings action to recover for the value of the work already finished. Can he recover?

A. Yes. A recovery is allowed in this case, on the ground that there is an implied condition annexed to the contract of the continued existence of the thing upon which the work is to be done. The owner of the house must keep it in readiness for the performance of the work, and even though it is destroyed without his fault, he is liable for the labor actually performed thereon before its destruction. *Niblo v. Binsse*, 3 Abb. Court of Appeals, Dec. 375; *Whelan v. Ansonia Clock Co.*, 97 N. Y. 295.

Q. A enters B's house and agrees to perform certain services for him without compensation. He works for two years and then leaves. He subsequently brings action to recover for the value of the services rendered. Can he recover?

A. No. The principle of unjust enrichment does not apply to this case. "Where one agrees to work for another gratuitously, although he may afterwards refuse to do so, he cannot recover for the services rendered." *Doyle v. Church*, 133 N. Y. 372.

CHAPTER XIV

Real Property

Q. A dies leaving a farm upon which there is growing grass and corn. To whom does the corn and grass belong, the heir at law or the administrator?

A. The grass belongs to the heir at law, and the corn goes to the administrator; the former being considered realty, while the latter is personalty. A distinction has always been taken between growing crops of grain and vegetables, such as wheat, corn and potatoes, the annual produce of labor in the cultivation of the earth, and growing trees, fruit and grass, the natural produce of the earth, which grow spontaneously and without cultivation. The grass and fruits growing on the lands, belonging to an intestate at the time of his decease, are not assets belonging to the administrator, but descend with the land to the heir. *Kain v. Fisher*, 6 N. Y. 597. The crops being treated as personalty pass to the administrator. *Matter of Chamberlain*, 140 N. Y. 390.

Q. A by will, devises all his real property to his son John, and all his personal property to his daughter Mary. At the time of his death, there were one hundred acres of wheat growing upon the farm, about half of which had been cut and bound. There was also a large orchard, and one hundred bushels of apples had been picked and barreled. A has debts amounting to \$1,000, which either the apples or the wheat will satisfy. To whom and in what shares do the apples and the wheat belong, and out of which must the debt be paid?

A. The wheat that has been cut and the apples that have been picked are personalty, and therefore go to the daughter; the apples on the trees go to the son. The cut wheat and the

picked apples must be used to satisfy the debt. If the uncut wheat is not needed for the payment of the testator's debts, it passes to the devisee, and the devisee has a right to call upon the executors to apply to the payment of the debts all other personal property not specifically bequeathed, before recourse is had to the crops. When the owner of the land has made a will devising the land to a certain person, it is said that there is evidence of an intention on his part, to have those lands go to the devisee in the condition in which they are at his decease. "Where land, upon which a crop is growing, is devised in such form as to convey it to the devisee, the crop is put upon the footing of a chattel specifically bequeathed, and cannot be sold for the payment of general legacies, but only for the payment of debts, after the other assets not specifically bequeathed, have been applied." *Bradner v. Faulkner*, 34 N. Y. 347; *Stall v. Wilbur*, 77 N. Y. 153; *Batterman v. Albright*, 122 N. Y. 484.

Q. A devised his farm to B for life, and after the death of B the farm to go to C in fee. B went in possession and sowed the farm with wheat, but before the crop was harvested, B died and thereafter C took possession of the farm as remainderman. The administrators of B undertook to gather the wheat, but C forbade them, claiming that the wheat belonged to him. To whom does the wheat belong, and what are the rights of the parties? Give reasons.

A. The administrators of B are entitled to the wheat, and are entitled to go upon the land to harvest the same. "At common law those products of the earth which are annual, and are raised by yearly manurance and labor, and essentially owe their annual existence to the cultivation by man, termed *emblems*, and sometimes *fructus industriales*, were even while still annexed to the soil, treated as chattels, with the usual incidents thereof as to seizure on attachment during the owner's life, and transmission after his death. This class included grain, garden vegetables and the like. On the other hand, the fruit of trees, perennial bushes and grasses and called

by way of contradistinction, *fructus naturales*, were, while unsevered from the soil considered as pertaining to the realty." 10 Amer. & Eng. Ency. of Law, 1038. The tenant is not entitled to emblements where the termination of his lease is fixed and certain, but in the case of a life tenant where the estate is uncertain and it is terminated by death the personal representatives of the life tenant are entitled to any crop planted before his death as emblements. *Hamilton v. Austin*, 36 Hun, 142; *Whitmarsh v. Cutting*, 10 Johns. 360.

Q. A cherry tree stands wholly upon the lands of A, with limbs overhanging the lands of B. The lands of A and B are separated by a rail fence. To whom do the cherries on the limbs of the tree which overhang the lands of B belong? Answer in full. Reasons.

A. The ownership of the entire tree follows the ownership of the land upon which the trunk of the tree stands, and that, regardless of the fact that a part of the roots may extend into the neighboring land. Therefore the entire fruit of the tree, including that growing on the overhanging branches, belongs to A. *Dubois v. Beaver*, 25 N. Y. 123; *Hoffman v. Armstrong*, 48 N. Y. 201.

Q. A tenant, under a parol lease for one year which expired on March 1, 1908, in the fall of 1907 planted a crop of winter rye which could not be harvested until March 1, 1908. In 1908, subsequent to March first, the landlord who was then in possession, harvested the crop, which was worth \$500. The landlord claims its entire ownership as against the former tenant. The seed planted by the tenant was worth \$100. State the principle of law governing the transaction, and who is entitled to the rye.

A. The landlord is entitled to the crop of rye, and is not liable for the value of the seed. The tenant knew when he planted the seed that he could not harvest the crop until after the expiration of his lease, therefore he has no claim to the crop. "A tenant by parol for a single year, has not, save by express

stipulation, or custom of the country or estoppel in pais, a right to an outgoing crop. It is true that a tenant holding by a tenure which is uncertain as to the time at which it will cease, is entitled to take off, after it has ceased, the crop which he has sowed in due course of husbandry. But if it is certain at the time when he sows, how long it will continue, and it is plain that he cannot, before it ceases, reap that which he may sow, then it is his own folly if he sows and he will not be permitted to reap." *Folger, J., in Reeder v. Sayre, 70 N. Y. 184, 185.*

Q. A and B own adjoining lands; a barn on A's land stands on stone abutments. A sells B fifteen feet next to B's lot, and the deed makes no reservation. The fifteen foot line cuts the barn in two. A parol agreement that A could remove the barn was made between the parties and A has done so. B sues for damages. Can he do so?

A. Yes, as title to half of the barn passed to B by the deed conveying the fifteen feet. "Where lands and buildings thereon belong to the same person, the buildings are a part of the realty and pass upon a conveyance thereof, and neither the grantor nor those claiming under him may show that it was agreed by parol that a building was to be reserved. He can retain title to the buildings only by some reservation in the deed, or by an agreement in writing answering the Statute of Frauds." *Leonard v. Clough, 133 N. Y. 292.*

Q. A, the owner of certain real property, executed and delivered a deed thereof to B, her husband, the grantee named therein, on the oral condition that if B did not need the property for his business, he was to reconvey the same to his wife, A. B did not need the property for his business, and A made due demand upon B for a reconveyance of the property as agreed, but B refuses to do so. What rights, if any, has A under the circumstances? Give reasons.

A. A has no right under the circumstances, and cannot compel a reconveyance of the property from B. "If we should give full effect to the plaintiff's claim, it would be to hold the

delivery by her of the deeds to have been conditional and not absolute; but that would be violative of the settled rule in this state that a delivery cannot be made to the grantee conditionally. Any oral condition accompanying the delivery, in such case, would be repugnant to the terms of the deed, and parol evidence to prove that there was such a condition attached to the delivery is made inadmissible. The reason for the rule applies to every case where the delivery is intended to give effect to a deed without the further act of the grantor. And such was this case; for she intended to convey to her husband, whatever their arrangement at the time, that the properties should remain hers, if not needed in his business. It was not a case where the deeds were not to pass out of the possession of the grantor, until certain conditions were fulfilled. These deeds had passed out of the plaintiff's possession and into that of the grantee, by the deliberate act of the former, and no oral condition, at the time, will be admitted to contradict the import of the written instruments." Gray, J., in *Hamlin v. Hamlin*, 192 N. Y. 169.

Q. A was erecting an apartment house in the city of New York, and contracted with B for certain mirror frames to be put in places left in the walls for that purpose. The frames were made and fastened in the walls by hooks and screws; if they were removed the walls would appear unfinished. The frames corresponded with the cabinet work of the rooms. After the completion of the work, A failing to pay for the same, B files a mechanic's lien. Can he do so? State your reasons.

A. Yes, as the mirror frames formed part of the realty. The intention of the person at whose instance the annexation was made to make these mirror frames a permanent accession to the house is directly apparent. There is an actual annexation made during the process of the building. These mirror frames were not brought into the house as a completed article of furniture, but they formed a part of the completion of the structure. The facts show that they were an essential part of the inner surface of the building; that they were of material

and construction to correspond with the fittings of the building; that they were fastened to the walls by hooks and screws; while they might be removed, nevertheless their removal would have left an unfinished wall and would have required work to supply their absence. It is from these circumstances that the intention to make them a part of the realty is gathered. See *Ward v. Kirkpatrick*, 85 N. Y. 413. In *McKeage v. Ins. Co.*, 81 N. Y. 38, where mirrors were brought into a house after its completion, as mere furniture for the purpose of ornament, it was held that they were personalty.

(NOTE ON FIXTURES.) Fixtures are articles which in themselves are personal property, but which by the actual or constructive annexation to the freehold have become a part of it, and consequently have taken on the form of realty. The paramount test, whether a given article be a part of the realty or whether it remains personalty, is the intention with which the annexation was made; that intention is the apparent and evident intention, and which may be found in an express agreement to that effect, or in the absence of an express agreement it must be gathered from the following circumstances; The character of the annexation; the adaptability of the thing annexed to the use of the freehold to which it is annexed; the relationship existing between the parties between whom the question as to whether the given article be a part of the realty or not arises, and in connection with the last test, the rule is that as between vendor and vendee, and as between mortgagor and mortgagee, the courts will adjudge the property annexed to be real estate rather than personal property, and consequently passing by a conveyance of the land. As between heir at law and personal representatives, executors and administrators, the same strict rule that is applied as between vendor and vendee applies, and that the article affixed will go to the heir at law unless a contrary intention on the part of the testator be evidenced from the circumstances. But as between landlord and tenant the rule is greatly relaxed, and as between them, articles which are affixed for ornament or domestic convenience and certain articles affixed for the purpose of trade, will be held to be personalty and removable by the tenant. *Bishop v. Bishop*, 11 N. Y. 123; *Snedacker v. Waring*, 12 N. Y. 170; *Murdock v. Gifford*, 18 N. Y. 28; *McRea v. Bank*, 66 N. Y. 489. The Court of Appeals in the case of *Potter v. Cromwell*, 40 N. Y. 287, after a full examination of the numerous authorities, gave its approval to the criterion of a fixture as follows: "The union of three requisites, First: Actual annexation to the realty or something appurtenant thereto. Second: Application to the use or purpose to which this part of the realty with which it is connected is appropriated. Third: The intention of the party making the annexation to make a permanent accession to the freehold." This statement has been quoted with approval

in many later decisions. *Voorhees v. McGinnis*, 48 N. Y. 278; *McFadden v. Allen*, 134 N. Y. 489; *Natl. Co. v. Yuengling*, 125 N. Y. 1; *Matter of City of New York*, 192 N. Y. 295.

Q. A tenant who was in possession of a factory under lease, removed a certain machine belonging to the landlord and which was on the premises and was included in the lease. He placed in the factory a new machine on the foundation of the old one that he removed for the purpose of conducting his business. The tenant's term is about to expire and he wishes to remove the new machine and to put back the old one, but the landlord refuses to permit him to do so, claiming that the same belongs to him. What do you say? Give reasons.

A. The tenant has a right to remove the machine, as it is a trade fixture, and as such removable by him before the expiration of his term, especially as the machine was attached in such a manner that it could be readily removed without any serious impairment to the building itself, which is an important circumstance bearing upon the right of the tenant to remove the fixture. *Andrews v. Day Button Co.*, 132 N. Y. 348. There was no intention to have the new machine form part of the realty. In the annexation of fixtures of this character by a tenant to the leasehold, the intent with which the property is attached is an important fact in determining whether the property is permanently affixed to the land or the right of removal remains in the tenant. *Kribbs v. Alvord*, 120 N. Y. 519; *Conde v. Lee*, 56 App. Div. 401.

Q. A leases land of B for one year and puts a building thereon for the purpose of his business. At the expiration of the year the lease is renewed for three years. The second lease is in writing and does not mention the building in any way. A short time before the expiration of the second lease, A desiring to terminate his tenancy consults you as to his right to remove the building. What would you advise are his rights?

A. He has no right to remove the building. "The tenant must remove fixtures during the term in which he erects them.

If he fails to remove them during the term there is an abandonment of the fixtures to the owner of the land; title to them passes to him. The taking of a new lease, though it be on the same terms of the original lease, is not a waiver of the abandonment, and the tenant cannot, during the second term created by the giving of a new lease, remove the fixtures; his rights in them are lost by his failure to remove them during the first term. If the tenant desires the right to remove the fixtures he must reserve the right expressly to himself in the new lease." *Loughran v. Ross*, 45 N. Y. 492. "The right of a tenant to remove fixtures erected for trade is conceded to him for reasons of public policy, and being the nature of a privilege he must exercise it before the expiration of the term or before he quits the premises." *Talbot v. Cruger*, 151 N. Y. 117.

Q. A and B each own adjoining lots; each has a well on his own lot. B gets angry at A and maliciously sinks his well deep enough to destroy the general source, thereby drying up A's well completely. What action, if any, has A against B? State the general rule.

A. A has no right of action against B. Percolating waters belong to the owner of the land through which they percolate, and he may do what he sees fit with the waters. He may take the waters absolutely and appropriate them to his own use. If there is an interference with percolating waters, preventing them from reaching the neighboring land, that interference does not give rise to a right of action. It is not a violation of any legal right, so that even though the interference be due to an improper motive, though it be actuated by malice, yet it will not give rise to a right of action, because where there is no violation of a legal right, motive is of no moment. "A party is not liable for the consequence of an act done upon his own land, lawful in itself, and which does not infringe upon any lawful rights of another, because he was influenced in the doing of it by wrong and malicious motives; the courts will not inquire into the motive actuating a person in the enforcement of a legal right." *Phelps v. Nowlen*, 72 N. Y. 39. See also *Clin-*

ton v. Myers, 46 N. Y. 511; Barkley v. Wilcox, 86 N. Y. 147.

Q. A and B own adjoining lots. B has been receiving the percolating waters from A's land as a supply to his (B's) well for more than twenty-five years. At the end of this period A sinks a well on his own land, the effect of which is to cut off the percolations which supply B's well. B brings action against A to prevent him from cutting off the percolations. Can he do so? Answer fully.

A. No. B has no prescriptive right to the percolations. In order to have a prescriptive right there must be an act done which is the violation of a right in the other, and this violation must continue for twenty years; a wrong which by a continuance thereof for twenty years can ripen into a right. There is nothing in these cases that can give rise to a prescriptive right, because the act of the owner of the land to which the percolating waters come, at no time is a violation of a right in the other, to which the other may be said to assent impliedly; so that a right to have percolating waters come to one's land cannot be acquired by simple continuance of the use of such waters for the period of twenty years. The fact that the owner of the land through which the waters percolate, who, by reason of his ownership in the land has title to those waters, has taken no steps to prevent the water percolating, does not deprive him of the right to those waters. *Bloodgood v. Ayres*, 108 N. Y. 400; *Covert v. Crawford*, 141 N. Y. 525.

Q. A is the owner of certain land through which certain waters flow to the X stream. This stream is used by the city of Buffalo as a reservoir. He digs a ditch which cuts off the supply of the water. The city brings action against him to restrain his act. Judgment for whom and why?

A. Judgment for the city. "Whatever may be the rule in respect to a landowner to use the water percolating through the earth and thereby to affect the sources of wells and springs upon his neighbor's land, he may not divert and diminish the natural

flow of a surface stream by preventing its usual and natural supply, or by causing through suction or otherwise a subsidence of its waters." *Smith v. City of Brooklyn*, 160 N. Y. 357; *Van Wycklin v. City of Brooklyn*, 118 N. Y. 424; *Colrick v. Swinburne*, 105 N. Y. 503.

Q. A and B are adjoining owners. There are two springs on A's land, one of which A uses for his own water supply, and for a valuable consideration accompanied by covenants of warranty, he grants to B the right to use the other spring. B lays pipes in order to conduct the water to his own house for his domestic use. Subsequently A's spring dries up and he sinks a well near the spring granted to B, thus cutting off its source and supply and rendering it worthless. B brings action against him. Can he recover?

A. No. "A limited and specific grant of the right to dig and stone up a certain spring and conduct the water therefrom through the grantor's land by pipes to the grantee's house, with covenants of warranty, does not render the entire premises servient to the easement; and the grantor may lawfully sink another spring, although the effect is to render the first one useless." *Bliss v. Greely*, 45 N. Y. 671.

(NOTE.) In *Johnston Cheese Mfg. Co. v. Veghte*, 69 N. Y. 16, it was said: "But there was no grant in that case (*Bliss v. Greely*, *supra*) of any particular supply of water from the spring or from the defendant's land. The grant was merely of the right to the spring and secured the plaintiff no greater rights than such as he would have had if he would have owned the land upon which it was situated. In this case the grant was of the use of the water which at the time of the grant was being conducted from the spring, and the intent was to secure the continuance of the supply of water, it being essential to the operation of the cheese factory conveyed."

Q. A gives B permission to open a road on A's farm. B immediately fenced in the way and spent considerable money thereon in grading and making it an appropriate way to his farm. B has exclusive and unrestricted use thereof as a road to his farm for thirty years. Then A barred up the way with gates and fences and prevented B from using the road in any

way thereafter. B brings action to restrain him. Can he succeed? What principle of law is involved?

A. B cannot maintain the action, as the permission given was a mere license and so revocable at any time at A's pleasure. The distinction must be drawn between an easement and a license. An easement is an interest in land, an incorporeal hereditament created by grant or prescription; it gives rise to an estate in the land and is therefore irrevocable. A license does not give the licensee any estate or interest in the land; it is a mere permit to do something on the land, and may be revoked by the licensor at any time, even though it has been used for longer than the period necessary for the acquiring of a prescriptive right, for there is never a violation of a right in the licensor, it being by his permission, and so no prescriptive right arises. Licenses may be given by parol, easements can only be created by deed or may arise by twenty years' adverse user. A mere license is not made irrevocable by the fact that a valuable consideration was paid therefor. *Wiseman v. Luckinger*, 84 N. Y. 31; *Cronkhite v. Cronkhite*, 94 N. Y. 323. "There can be no equitable estoppel which will operate to prevent the revocation of a license, grounded upon the fact that the licensee has entered upon the land and expended labor and money upon the faith of the license. It seems that an easement to do some act of a permanent nature upon the lands of another cannot be created by a license even when in writing executed upon a good consideration; it can only be created by a deed or conveyance operating as a grant." *Peckham, J., in White v. Manhattan R. R. Co.*, 139 N. Y. 19.

Q. A granted to B, by deed, a certain private way across his (A's) land. Having become angry at B, A thereupon obstructed the road so that it was impossible for B to pass over it. B thereafter removed certain fences in A's adjoining farm so as to be able to pass on A's land around said obstruction. A starts suit against B for trespass. Can he succeed?

A. Yes. "The grantee of a private way, which has become

foundrious and impassable, cannot, without being a trespasser, go on the adjoining close, and thus pass around the obstruction. The rule is the same, where the owner of the close through which the private way passes, caused the obstruction. The only remedy for the owner of the way is to remove the obstruction and to prosecute for damages." *Williams v. Safford*, 7 Barb. 310; *Fowler v. Lansing*, 9 Johns. 349; *McMillan v. Cronin*, 75 N. Y. 477.

Q. A conveyed by warranty deed to B, ten acres of land surrounded on three sides by his remaining land and on the other side by the land of C, so that B has no way in getting to and from his ten acres except to cross A's or C's land. Afterwards B buys C's tract from him and has easy access to the road; he, however, claims a right of way over A's land. What are the rights and obligations of the parties? Give your reasons in full.

A. When B bought A's land he acquired a right of way over A's land by way of necessity. This way of necessity ceased when B bought C's tract and acquired an access to the road, because when the necessity ceases the easement also ceases. For a full discussion of easements by necessity, see *N. Y. Ins. Co. v. Milner*, 1 Barb. Chan. 352; *Palmer v. Palmer*, 150 N. Y. 146.

Q. A owns the X farm and the Y farm adjoining. He builds a road through the Y farm to the X farm and uses it for thirty years. A then sells to B the X farm with all easements, and the Y farm to C subject to all easements. C seeks to close the way across the Y farm. B comes to you for advice. What are his rights?

A. B can prevent the closing of the way as he has an easement. "The owner of real property has during his ownership entire dominion and control over its natural qualities and may dispose of and arrange them at will. He may alter the natural dispositions of those qualities, so as essentially to change the relative value of the different parts, and may in a great variety of ways, make one portion of the premises subservient to an-

other. No easement exists so long as there is a unity of ownership, because the owner of the whole may at any time rearrange the qualities of the several parts. But the moment a severance occurs by the sale of a part, the right of the owner to redistribute the properties of the respective portions ceases; and easements or servitudes are created corresponding to the benefits and burdens mutually existing at the time of the sale." *Selden, J., in Lampman v. Milks*, 21 N. Y. 505. See also *Simmons v. Cloonan*, 47 N. Y. 3; *Beardslee v. New Berlin L & P. Co.*, 207 N. Y. 38; *Wells v. Garbutt*, 132 N. Y. 430; *Hill v. Bernheimer*, 78 Misc. 472.

Q. A was the owner in fee of certain city lots situated upon B Street, which was closed in 1910, in pursuance of a law passed in 1908. In 1913 A sold and deeded the lots to C by the usual full warranty deed, and which bounded the lots in the front of B Street. The award of damages to the lots caused by the closing of said Street was made in 1914. A and C both claimed the amount of the award. Who is entitled to the award and why?

A. A is entitled to the amount of the award. "The right to damages for injuries to the owner of adjoining premises by closing of a highway is personal and accrues and vests in the owner immediately upon the closing, although not fixed and ascertained until after a subsequent conveyance of the premises; it does not pass with the land unless in terms embraced in the deed of conveyance. Merely bounding premises by a public highway for purposes of description in a conveyance made after the road has been actually closed, does not expose the grantor to the equities of an estoppel." *King v. City of N. Y.*, 102 N. Y. 172. This rule is well settled and has been followed in *Harrison v. Kingston Realty Co.*, 116 App. Div. 704; *Matter of Hamilton Street*, 144 App. Div. 702; *Matter of 151st Street*, 149 App. Div. 64.

Q. A and B are tenants in common of a tract of land over which a stream of water flows. B individually owns land fur-

ther down the stream upon which there is a mill. B without A's consent dams the stream, thus making it overflow the lands owned in common by A and B. This is continued for a period of twenty-five years, during which time A makes no complaint. B then sells the land which he owns individually and the mill thereon to X, with the privilege of operating the mill and using the dam in the same way as used by him. Subsequently A and B together sell their lot, which they hold as tenants in common, to Y. Y brings an action against X for flooding his land. X sets up a prescriptive right. Is this defense good?

A. The defense is not good. "One tenant in common cannot by his sole act create an easement in the premises held in common. Nor can a tenant in common, who holds other premises in severalty, so use the last as to acquire or exercise for the benefit thereof an easement in the property held in common, and he cannot by grant or operation of an estoppel or otherwise, confer upon another rights and privileges which he does not himself possess." *Crippen v. Morse*, 49 N. Y. 63; *City Club v. McGeer*, 198 N. Y. 165.

Q. Plaintiff leased to the defendant a house for the term of one year, rent payable at the end of the term. Defendant took possession. The plaintiff against the protests of the defendant removed the defendant's property into a wing and prevented the defendant from having access to the main building. The defendant occupied the wing during the term, when the plaintiff demanded the proportionate rent which the defendant refused to pay. Plaintiff sues upon a quantum meruit. Defendant sets up the facts. Plaintiff demurs. For whom should judgment be rendered?

A. Judgment for the defendant. "Where the landlord during the continuance of the lease evicts a tenant from a part of the premises, the tenant is relieved during the continuance of such eviction from the payment of any portion of the rent. The tenant under such circumstances is not bound to vacate the premises, and is entitled to refuse payment of the rent until

possession of the whole of the demised premises is restored. The landlord cannot only not recover the rent as rent, but cannot even recover the value of the portion of the premises which the tenant still enjoys, by means of an action for use and occupation." *Carter v. Byron*, 49 Hun, 299; *Stern v. Brauer*, ~~62 App. Div. 388~~; *Sirey v. Braems*, 65 App. Div. 472.

Q. An attorney rented an office in a building; during his occupancy the owner rents the adjoining room to printers. The noise of the presses is such that the lawyer cannot work at all, and each day the noise drives him from his office. He remains until his lease expires, and in an action for rent he sets up the defense of eviction. Judgment for whom?

* A. Judgment for the landlord. There was no constructive eviction, for the essential element of a constructive eviction is abandonment of the possession of the premises. There can be no constructive eviction, save where the tenant has actually abandoned the premises. *Boreel v. Lawton*, 90 N. Y. 293; *T. H. E. Co. v. Durant*, 144 N. Y. 44.

(NOTE ON EVICTION.) Eviction is either actual or constructive. There is an actual eviction of the tenant whenever he is actually ousted of possession of the premises or a part thereof, either by a stranger who claims by a title paramount to that of his lessor or by an act of his lessor. If the lands demised be recovered by a third person under a superior title, there is an actual eviction and the tenant is discharged from liability for the payment of rent after the ousting. When there is an eviction as to part of the lands by a stranger under a claim of paramount title, the result of this eviction is to discharge so much of the rent as is in proportion to the value of the land from which the tenant is evicted. If the lessor himself expels the tenant absolutely from the premises, the tenant of course is relieved from the necessity of paying rent. And as we have already seen, where the tenant is actually ousted from a part of the premises by his lessor, he is relieved absolutely from the payment of the whole rent. *Christopher v. Austin*, 11 N. Y. 216; *Johnson v. Oppenheim*, 12 Abb. Pr. (N. S.) 449; *Lawrence v. French*, 25 Wend. 443; *Dyett v. Pendleton*, 8 Cowen, 727; *Home Life Ins. Co. v. Sherman*, 46 N. Y. 370; *Tallman v. Murphy*, 120 N. Y. 345.

Q. A landlord leases premises to a tenant for one year, rent payable monthly. The tenant goes into possession, and after

six months, the landlord causes a nuisance to exist on the premises which renders them untenable. The tenant ceases to pay rent after the beginning of the nuisance, but stays in possession until the end of the year, when the landlord sues him for the unpaid rent. At the trial the attorney for the tenant requests the court to charge the jury as follows: 1. That to create an eviction it was not necessary for the tenant to surrender the premises. 2. That the landlord cannot recover rent which accrued after the creation of the nuisance. 3. That even if the landlord can recover such subsequent rent, the tenant has a counterclaim for damages against the landlord. If you were the judge, how would you charge the jury on each of these propositions?

A. The judge should refuse to charge each request. 1. Constructive eviction results whenever the lessor by his own act, or by his own procurement, renders the enjoyment of the premises demised impossible, or diminishes the enjoyment of the premises to a material extent. But it is absolutely essential, in order to have a constructive eviction, that the tenant should abandon the premises. 2. If the tenant remains in possession he has no defense to an action for rent which accrued after the creation of the nuisance. 3. In the absence of a covenant to repair, or a covenant of quiet enjoyment, the tenant cannot, in an action for rent brought by the landlord, set up as a counterclaim, the damages caused by the neglect of the landlord in permitting a nuisance to exist on the premises. *Edgerton v. Page*, 20 N. Y. 281; *Romaine v. Brewster*, 10 Misc. 120; *Donovan v. Koehler*, 119 App. Div. 51.

Q. A leases certain premises to B for the term of one year. The tenant (B) goes into possession and after six months vacates said premises. The landlord then rents the premises to C. The landlord then brings an action against B on the lease for rent. If you were B's attorney what defense would you set up?

A. The landlord's taking possession of the premises after the surrender and reletting the premises to another constituted

an acceptance of the surrender. And the acceptance by a landlord of the surrender of leased premises will prevent the recovery of rent thereafter accruing. *Hall v. Gould*, 13 N. Y. 127; *Morgan v. Smith*, 70 N. Y. 537. If the landlord refuses to accept the surrender and notifies the tenant that he will hold him for the rent, and states that he will lease the premises for the tenant's benefit, and the tenant having expressly or impliedly assented to such leasing or renting to another, then it is held that the landlord is entitled to recover the rent stipulated less the sum received from the new tenant, on the ground that in such cases there is no acceptance of surrender and the premises are leased on the original tenant's account, the tenant having assented to the arrangement. *Underhill v. Collins*, 132 N. Y. 269; *Gray v. Dairy Co.*, 162 N. Y. 388.

Q. A certain lease expires on May 1, 1912. On that day, the tenant's wife is so sick that the doctor forbids her removal. On May 3, 1912, the wife is able to be removed, and the tenant quits the premises. The landlord consults you as to his rights, if any, against the tenant. What advice would you give him?

A. The landlord cannot treat the unavoidable holding over as a renewal of the lease for another year; sickness is an excuse for so holding over. While the rule giving the landlord the right to treat the tenant who holds over as a tenant for a new term from year to year is very strict, it is not every holding over that creates such a term at the option of the landlord. A holding over because of death or extreme sickness at the time the lease expires, is not such a holding over as creates a new lease. *Herter v. Mullen*, 159 N. Y. 28; *Stewart v. Briggs*, 147 N. Y. 387. A tenant who holds over after the expiration of a definite term of a year or years may be treated by his landlord as a trespasser or as a tenant from year to year. The right of the landlord to treat the holdover as a tenant for a new term does not spring from the contract of the parties but is the penalty imposed by law upon the trespassing tenant. *U. M. R. & D. Co. v. Roth*, 193 N. Y. 570.

Q. A, by written lease, in which there is no covenant to repair, rents certain property to B. During the tenancy, the roof leaks so as to render the upper story of the house uninhabitable. Who must make the repairs?

A. In the absence of a covenant in the lease to that effect, the landlord is never bound to repair; that duty rests upon the tenant, for he is absolutely in possession of the premises. *Hallett v. Wylie*, 3 Johns. 44; *Graves v. Berdan*, 26 N. Y. 498; *Suydan v. Jackson*, 54 N. Y. 450.

Q. A certain tenant is in possession of a certain dwelling house under a lease which has about four years to run. The house is damaged by fire and thereby becomes untenable. The tenant wishes to know his right to surrender the premises because of said fire and his liability for the payment of rent for the time subsequent to the surrender. Give your advice and state the rule.

A. The tenant where the injury or destruction occurred without his fault or neglect may surrender possession of the premises without being liable for the subsequent rent, provided that no express agreement to the contrary has been made in writing. Of course the rent before the injury or destruction of the premises must be paid by the tenant. This is provided for by sec. 227 of the Real Property Law (chap. 52, Laws 1909). *N. Y. Co. v. Motley*, 143 N. Y. 156; *May v. Gillis*, 169 N. Y. 330; *Lehmeyer v. Moses*, 67 App. Div. 531, aff'd in 174 N. Y. 518. The accrued rent must be paid; see *Craig v. Butler*, 83 Hun, 286, aff'd in 156 N. Y. 672.

Q. A leases the Royal Hotel to B for three years. There are no covenants in the lease as to who is to make the repairs. In the first year the water pipes of the hotel burst and B was unable to procure a sufficient amount of water for the purposes of his business. B remains in possession, but refuses to pay his rent. The landlord brings an action to recover the rent, and B defends on the ground that the premises were untenable. Judgment for whom and why? State your reasons.

A. Judgment for the landlord. "An answer interposed in an action brought to recover the rent of a hotel, alleging that the demised premises became untenable because the water pipes of the hotel burst and the water supply failed, but not alleging that the landlord had covenanted to make repairs to the demised premises, does not present a defense. The provisions of the law relieving the tenant from the payment of rent of a building, which without fault or negligence on his part shall have been destroyed or injured by the elements or other cause as to be untenable, have reference to a destruction or injury resulting from sudden and unexpected action of the elements or other cause, and not to a gradual deterioration and decay, produced by the ordinary action of the elements. A tenant even in a case coming within the statute, is not discharged from the obligation to pay rent unless he surrenders up the possession of the demised premises." *Lansing v. Thompson*, 8 App. Div. 54; *Smith v. Herr*, 108 N. Y. 31; *Franklin v. Brown*, 118 N. Y. 110; *Sherman v. Ludin*, 79 App. Div. 37.

Q. A leases to B certain premises for the storage of goods. In the lease there is a covenant to the effect that the landlord will make all necessary repairs. By reason of the defective condition of the roof which B had informed A of, the water leaked through causing great damage to B. B, however, had an opportunity to remove the goods but did not do so relying on the covenant of the landlord to repair. B brings action against A to recover the damages sustained. Conceding the above facts as stated, who should have judgment and why?

A. Judgment for A. "A lessee knowing that property left upon the demised premises will be exposed to injury in consequence of the lessor's failure to repair, has no right to take the hazard, and if he does, and his property is injured, he cannot recover damages from his lessor therefor." *Huber v. Ryan*, 57 App. Div. 34.

Q. A holds an estate for life, and B the remainder in fee. The city makes an assessment on the property for certain local

improvements. A refuses to pay the same, claiming that the duty to do so is upon B, the remainder-man. What are the rights of the parties?

A. It is well settled that the duty of paying all current taxes as they accrue is entirely upon the life tenant, and he cannot look to the remainder-man for contribution; if the life tenant neglects to pay the taxes, the remainder-man is entitled to proceed against him for the appointment of a receiver to collect the rents and make payment of the taxes. *Seidenberg v. Ely*, 90 N. Y. 265; *Deraismes v. Deraismes*, 72 N. Y. 154. A municipal assessment differs from a tax in this respect; that the tax is a contribution for general governmental purposes, but an assessment for municipal improvements is a making of compensation for benefit received. The general rule is that the municipal assessment for permanent improvements is apportioned between the life tenant and the remainder-man, and the apportionment must depend upon the circumstances of each particular case and the respective interests of life tenant and remainder-man. The apportionment is usually fixed by the probable duration of the life tenant's term, and this of course depends upon the age of the life tenant, etc. *Peck v. Sherwood*, 56 N. Y. 615; *Thomas v. Evans*, 105 N. Y. 611; *Chamberlin v. Gleason*, 163 N. Y. 214.

Q. A gave B a mortgage upon certain real estate nominally to secure the payment of \$10,000 on demand. This mortgage was, in fact, given to secure advances thereafter to be made by B under an agreement by A to erect some buildings upon the mortgaged premises, the advances to be made as the buildings progress, and the same to be completed within one year. If the work proceeded according to the agreement no demand was to be made for the mortgage debt until three months after A was entitled to his last payment under the contract. When B had advanced \$5,000 under the contract, A abandoned it, leaving the buildings unfinished, and assigned to C for the benefit of his creditors. B at once brought an action to foreclose his mortgage without any demand and without waiting for the time set

for the completion of the building. C as the assignee of A defended the action, claiming that a demand was necessary before suit and that the action was prematurely brought. Who should have judgment and why?

A. Judgment for B. "But the plaintiff's agreement to advance money and his promise to delay foreclosure were both dependent upon the undertaking of A to erect the houses; where, therefore, he repudiated the further performance of the contract, the plaintiff was discharged from all obligation to do either and set at liberty to enforce his securities for the money already advanced. A previous demand of payment was not essential to a cause of action." *Gillett v. Balcolm*, 6 Barb. 370; *Ferris v. Spooner*, 102 N. Y. 12; *Union Ins. Co. v. Central Trust*, 157 N. Y. 633; *Callanan v. R. R. Co.*, 131 App. Div. 318.

Q. A who is a married man purchases a certain piece of land, paying \$5,000 in cash and giving a mortgage for the remainder. After his death the mortgage is still upon the property, and the widow claims dower in the whole property. What are her rights? State the rule.

A. The widow is not entitled to dower in the whole of the property, but only in the amount in excess of the purchase money mortgage. The decisions before the statute held that the reason for the wife not being entitled to dower in such cases is that the husband had only an instantaneous seizin in the property. *Cunningham v. Knight*, 1 Barb. 399; *Stow v. Tift*, 15 Johns. 458; *Mills v. Van Voorhis*, 20 N. Y. 412. Section 193 of the Real Property Law (Consolidated Laws, chap. 50) continues this rule, and is as follows: "Where a husband purchases lands during the marriage, and at the same time mortgages his estate in those lands to secure the payment of the purchase-money, his widow is not entitled to dower of those lands, as against the mortgagee or those claiming under him, although she did not unite in the mortgage. She is entitled to her dower as against every other person."

(NOTE.) Dower is an estate for life which the widow is entitled to in one-

third of all the lands whereof her husband was seized at any time during the coverture. The requisites necessary are: 1. A valid marriage. 2. Seisin of the husband of an estate of inheritance at some time during the coverture. 3. Death of the husband. *Wait v. Wait*, 4 N. Y. 99; *Durando v. Durando*, 23 N. Y. 331; *Phelps v. Phelps*, 143 N. Y. 197.

Q. A and B are husband and wife. Subsequently B, the wife, obtains an absolute divorce from her husband. A, the husband, dies leaving certain real estate. B claims dower in the same. What are her rights? Suppose A, the husband, obtained a divorce for the misconduct of his wife, then would B, the wife, be entitled to dower in A's real estate?

A. B is entitled to dower in the lands of A of which he was seized before or at the time the decree of divorce was granted, but she would not be entitled to dower if the husband had obtained a divorce for her misconduct. This is provided for in sec. 196 of the Real Property Law (Consolidated Laws, chap. 50), which says: "In case of a divorce, dissolving the marriage contract for the misconduct of the wife, she shall not be endowed." That the wife's inchoate right of dower is not affected by a decree of divorce granted for the misconduct of the husband, sec. 1759, part 4, Code of Civ. Pro., provides as follows: "Where final judgment is rendered dissolving the marriage, the plaintiff's inchoate right of dower in any real property of which the defendant then is or was theretofore seized, is not affected by the judgment." *Van Cleef v. Burns*, 133 N. Y. 540.

Q. A secures an absolute divorce from B, her husband, for his misconduct. He subsequently purchases real estate and dies intestate. A claims dower in the land. What are her rights?

A. She is not entitled to dower. A divorced wife is not entitled to dower in the realty of her husband acquired after the divorce, for at that time the relation of husband and wife no longer exists between them. *Kade v. Lauber*, 16 Abb. Pr. (N. S.) 288; *Matter of Ensign*, 103 N. Y. 288.

Q. If an estate is conveyed to John Brown and Jane, his wife, how do they hold it?

A. They hold it as tenants by the entirety. The estate by the entirety still exists; it was not abolished by the Married Women's Acts. The effect of those acts is to give to the husband and wife each a moiety of the rents and profits of the land during their joint lives. A grant to two and their heirs at common law would have vested in these two a joint estate without any words to that effect. The statute, however, now provides that such a grant shall vest in the grantees an estate in common, and in order to create a joint estate, you must have express words to that effect. The statute simply applies to joint estates proper, and does not apply to estates by the entirety. The result is that the grant to a husband and wife, without any words of exception, vests in them after the statute as before an estate by the entirety; but the statute modifies the common-law rule in this, that the husband and wife each take a moiety of the rents and profits during their joint lives, and the husband is not, as theretofore, entitled to the entire rents and profits of the land. *Bertles v. Numan*, 92 N. Y. 152; *Zornlein v. Bram*, 100 N. Y. 12; *Grosser v. City of Rochester*, 148 N. Y. 235; *Banzer v. Banzer*, 156 N. Y. 436.

Q. A husband and wife hold an estate in lands by the entirety. The husband afterwards secures a divorce and remarries. He then dies intestate. What are the rights of the parties? State your reasons.

A. The divorce converts the tenancy by the entirety into a tenancy in common. The first wife therefore holds an undivided half in fee simple; the second wife has dower in the husband's one-half interest. "As such tenancy is founded upon the marital relation, and upon the legal theory that the husband and wife are one, it depends for its continuance on the continuance of the relation, and when the unity is broken by a divorce, the tenancy is severed; each takes a proportionate share of the property as a tenant in common. There

is no implied condition annexed to the estate by the entirety that the grantees shall remain faithful to the marriage vow, or that either shall not by misconduct cause a severance of the marital relation, and a decree of divorce granted because of adultery, does not vest the whole title in the innocent party." Peckham, J., in *Stelz v. Shreck*, 128 N. Y. 263.

Q. A and B, who are husband and wife, hold an estate as tenants by the entirety. A, the husband, executes a mortgage on the land. The mortgage is foreclosed, and C purchases the property at the foreclosure sale. What interest and rights does he acquire?

A. In *Hiles v. Fisher*, 144 N. Y. 306, it was held: "Where a husband executed a mortgage on lands deeded to him and his wife, that the mortgage was effectual to cover his interest, which was a right to the use of an undivided half of the estate during their joint lives, and to the fee in case he survived her, and that the purchaser on the sale under foreclosure of the mortgage acquired this interest and became a tenant in common with the wife, subject to her right of survivorship. The grand characteristic which distinguishes a tenancy by the entirety from a joint tenancy is its inseverability, whereby neither husband nor wife, without the assent of the other, can dispose of any right of the estate, so as to affect the right of survivorship in the other."

(NOTE.) "Under a deed made since the enabling act to a husband and wife, which provides in express terms that they should take as joint tenants and not as tenants in common, the wife takes and holds as a joint tenant with her husband, and not as a tenant by the entirety." *Joos v. Fey*, 129 N. Y. 362. It also appears that by proper words in the conveyance expressing such intention, a husband and wife may take as tenants in common. *Miner v. Brown*, 133 N. Y. 308.

Q. A, the wife of B, takes an undivided one-half interest in certain real estate by descent. B subsequently purchases the remainder. A, the wife, dies leaving one child, and B claims the estate as survivor. What are the rights of the parties?

A. B is not entitled to the whole estate as survivor, for the estate was not held by them as tenants by the entirety, not being created by the same deed. They hold as tenants in common, and there is no incident of survivorship annexed to that estate; on the death of either tenant, his undivided half descends to his heirs. If there were an estate by the entirety here, the entire estate would go to the survivor just as in joint tenancies. The wife, having died intestate, the husband is entitled to curtesy, a life estate in her undivided half of the land, and the child to the remainder in fee. The estate of curtesy at the death has not been abolished. It, however, obtains only where the wife chooses to die intestate. She can bar the right by deed or will. "The common-law rights of a husband as a tenant by the curtesy are not affected by the acts of 1848 for the more effectual protection of the property of married women as to the real property of the wife undisposed of at her death." *Hatfield v. Sneden*, 54 N. Y. 280. And the recent statutes have worked no change in the estate by the curtesy. *Matter of Starbuck*, 137 App. Div. 866. The essentials of an estate by the curtesy are: 1. A lawful marriage. 2. Seisin by the wife of an estate of inheritance during the coverture. 3 Issue born alive capable of inheriting the estate. 4. The death of the wife. It will be noticed that an estate by the curtesy is an estate for life in all the lands of the wife, while dower is merely a life interest in one-third of all the lands of the husband.

Q. A and B are husband and wife. They have a child C, which dies at the age of six years. After the death of the child, the wife becomes seized in fee of a piece of real estate and dies intestate, leaving a brother as her only heir at law. What interest in the estate are the husband and brother respectively entitled to?

A. The husband is entitled to a life estate in the property, the brother to the remainder in fee. The husband is entitled to a life estate (curtesy) as there was a child born alive capable of inheriting the estate; it matters not that the child died before the wife became seized. All the other elements of the es-

tate by the curtesy are also present; seisin by the wife of an estate of inheritance, and death of the wife intestate. *Leach v. Leach*, 21 Hun, 381; *Jackson v. Johnson*, 5 Cowen, 75; *Beardsley v. Hotchkiss*, 30 Hun, 615.

Q. A duly conveyed a life interest in certain real estate to B, his wife, and the remainder to C, his daughter subject to B's life interest. C had a husband D, and a child was born of their marriage. C who never had actual possession of the property died before B who had the actual possession thereof. After the death of C, her husband, D, brought an action against B to recover possession of the property. Judgment for whom and why?

A. Judgment for B, as C never had been seized of the premises. "It does not appear that the wife was ever in actual possession of the property, since the life tenant survived her, and it is assumed that the wife was never in actual possession of the property. The wife died before the termination of the life estate, and hence the only interest that she ever had in the land was an estate in remainder. We think that the appeal cannot be sustained, since actual seisin in the wife is necessary in order to vest the husband with the estate in curtesy." *O'Brien, J., in Collins v. Russell*, 184 N. Y. 76.

Q. A contracts with B to sell the latter a house and lot. A received title from his wife by means of a quitclaim deed. The wife had a good right to convey the same. A offered his sole deed to B, who comes to you. What would you advise him?

A. B has a right to refuse to take the property; his wife must join in the deed. "A release of dower by the wife directly to her husband will not divest her dower, so as to enable the husband to convey good title by his sole deed. If effectual at all on delivery of such release, the husband becomes the owner of the property and the wife becomes entitled to dower therein." *Wightman v. Schliefer*, 45 N. Y. St. Rep. 698.

(NOTE.) "By virtue of the statute which permits husband and wife to

convey directly to each other without the intervention of a third person, a husband may convey directly to his wife his interest in lands of which they are seized as tenants by the entirety. After a subsequent conveyance by a warranty deed of a wife so invested with the whole title, both she and her husband are estopped by their deeds from questioning the title of the grantee." *Hardwick v. Salzi*, 46 Misc. 1; *Mardt v. Scharmach*, 65 Misc. 125; *Meeker v. Wright*, 76 N. Y. 262.

Q. A description reads as follows: Commencing at the corner of A street and B street, running thence along B street twenty-five chains, thence one hundred chains parallel with A street to a hemlock tree; thence along the margin of A street to the beginning. The measurements show that the one hundred chain course is twenty-five chains short of reaching the hemlock tree. Who is entitled to the twenty-five chains, grantor or grantee? Give reasons.

A. The grantee. Boundaries by fixed objects or monuments must control over measurements, upon the presumption that all grants are made with reference to an actual view of the premises by the parties thereto. The rule is well settled that where there is an uncertainty as to the plot of land intended to be conveyed, arising out of differences between the land described by metes and bounds, and that embraced in lines extending to natural or artificial monuments or objects mentioned in the deed, that the former shall give way, as being less certain, and be controlled by the latter description. *Raynor v. Timerson*, 46 Barb. 518; *Wendell v. People*, 8 Wend. 183; *Yates v. Vandebogert*, 56 N. Y. 531; *People ex rel. v. Jones*, 112 N. Y. 604.

Q. A was the owner of a tract of land consisting of two hundred acres through which ran a public highway, north and south, and included in the two hundred acres; the said highway divided the tract of land in two equal parts. A granted to B all of the land lying east of the highway and to C he granted all of the land west of the highway. Question has arisen whether B or C is the owner of the highway mentioned. What do you say?

A. The highway belongs to both B and C, as a conveyance of land bounded upon a highway carries the title to the center thereof. "It may be considered as the general rule, that a grant of land bounded upon a highway carries the fee in the highway to the center of it, provided the grantor at the time owned to the center and there be no words or specific description to show a contrary intent." 3 Kent's Commentaries, 433. And this continues to be the rule. *White v. Nichols*, 64 N. Y. 65; *Haberman v. Baker*, 128 N. Y. 253; *Johnson v. Grenell*, 188 N. Y. 410. The rule also applies to devises.

Q. A owns property abutting on a nonnavigable stream. He conveys the land to B. To how much, if any, of the stream does B get title?

A. In the absence of restrictions in express words or other facts indicating a contrary intent, a deed of lands bounded upon an inland pond or nonnavigable fresh water stream is presumed to convey to the center. But the rule is otherwise where the boundary is expressly made the bank of the stream. *Starr v. Child*, 5 Denio, 599; *Halsey v. McCormick*, 13 N. Y. 296; *Gouverneur v. N. I. Co.*, 134 N. Y. 355; *Town v. Town*, 97 App. Div. 7.

(NOTE.) "Separate devises of lands upon the east and west sides of a river where the devisor owns the lands under the water thereof, in the absence of any clause-limiting them to the banks of the river, carry the title to the center or thread of the stream, although the river is navigable and the tide ebbs and flows therein." *Smith v. Bartlett*, 180 N. Y. 360.

Q. A owned a house and lot and by written contract with B he agreed to sell the same for \$5,000. The contract contained no agreement warranting the title. The house and lot were subject to a mortgage for \$3,000, which had been recorded and was unknown to B when the contract was made. Subsequently B learned of it and that the house and lot were sold on its foreclosure. B then refused to perform the contract. A, however, insisted that as the contract contained no express warranty of the title, B was bound to pay the agreed con-

sideration, and brought an action against B therefor. Under the facts disclosed, can A recover?

A. No. "The general rule is well settled that a vendor under an executory contract for the sale of land, unless exempted by the terms or nature of the contract, is bound to convey a good title, free from any essential defect, and the purchaser cannot be compelled to accept a conveyance of property differing from the contract in any material particular. The obligation of the vendor to convey a good title exists independently of any express undertaking in the contract. Where not expressed, it is implied from the nature of the transaction. And although the title rendered may in fact be good, yet if it is subject to reasonable doubt depending upon the ascertainment of some material fact extrinsic to the record title, to be found by a jury when the question arises, the purchaser in general will not be required to complete the purchase, for he is entitled to a title not only good in fact, but marketable. *Burnell v. Jackson*, 9 N. Y. 535; *Fleming v. Burnham*, 100 N. Y. 1; *Moore v. Williams*, 115 N. Y. 586. Where the vendee refuses to perform his contract, or is unable to do so by reason of some defect in the title affecting the substance of the thing contracted for, or where the contract was induced by fraud or misrepresentation, the vendee may treat the contract as rescinded and recover back any deposit made on account of the purchase money and the necessary expenses to which he has been put preliminary to the completion of the contract on his part." *Lawrence v. Taylor*, 5 Hill, 114; *Garves v. White*, 87 N. Y. 463; *Blanck v. Sadlier*, 153 N. Y. 551, 556.

Q. A sold a farm to B for \$10,000. B does not record his deed but goes into actual possession. Afterwards A sells the farm to C for \$8,000. C records his deed. Who owns the property?

A. B owns the property, having been in actual possession of the same at the time of the conveyance to C. Such actual possession is equivalent to notice of the unrecorded deed.

“One who seeks to establish a right in hostility to a recorded title or to security upon land by virtue of an unrecorded conveyance, must show actual notice to a purchaser of his rights or circumstances which will put a prudent man on his guard. Constructive notice will not suffice.” *Brown v. Volkening*, 64 N. Y. 76. “The possession which will constitute constructive notice of an unrecorded deed to a subsequent purchaser must be under the deed, an actual, open and visible one, so that the subsequent purchaser could have gone upon the land and obtained by inquiry information.” *Page v. Waring*, 76 N. Y. 463.

(NOTE.) A subsequent recorded instrument in order to take precedence over a prior unrecorded instrument, must be one recorded by a bona fide purchaser. A docketed judgment will not take precedence over a prior unrecorded instrument as a mortgage, and also a recorded mortgage given for a past debt will not take precedence over a prior unrecorded mortgage or unrecorded conveyance. See *Howells v. Howells*, 160 N. Y. 308. See also sec. 291 of the Real Property Law (Consolidated Laws, chap. 50).

Q. A leases certain premises from May 1, 1914, to B. The lease being in writing and was made on January 1, 1914, and was to continue for two years. When May 1 came, B wanted to take possession of the said premises but could not do so as C, the former tenant, claiming to have the right to remain in the said premises, refused to vacate. B then began an action against A to recover the return of the deposit which he gave on the lease. Can he do so?

A. No. A did not undertake to put B in possession of the premises. He only leased them to him. B could have begun summary proceedings to remove C from the possession. *Gardner v. Ketteltas*, 3 Hill, 330; *Goerl v. Damrauer*, 27 Misc. 555. “It was not incumbent upon the lessor to put the lessees into actual possession. All that was incumbent upon the landlord was to put the tenant in legal possession, that is, to see to it that no one else had a superior right of possession, so that no obstacle would be interposed to the tenants obtaining actual possession. For all that appears in this case the persons in possession of the property on the date of the term of the lease

was to commence were holding over after the expiration of some lease or letting, and therefore were strangers and liable to summary dispossession." *Mirsky v. Horowitz*, 46 Misc. 258; *Smith v. Barber*, 96 App. Div. 236.

Q. A had the record title and claimed to be the owner in fee of certain lands. B at the same time was in actual possession of the land claiming under a title adversely to A. C, who knew of the facts, for a good and valuable consideration purchased by a deed of conveyance the said lands from A, and at once brought a suit in ejectment against B to recover possession. Who should have judgment and why?

A. Judgment for B. "A grant of real property is absolutely void, unless the same shall be made to the people of the state of New York, if at the time of the delivery thereof, such property is in actual possession of a person claiming under a title adverse to that of the grantor." This is provided for in sec. 260 of the Real Property Law.

CHAPTER XV

Sales

Q. A agrees with B to sell him a horse for \$500, payment to be made at the time of delivery. Before the same can be delivered, a fire breaks out on A's farm, where the horse is being kept, and the horse perishes in the flames. B sues A for non-delivery. Judgment for whom?

A. Judgment for A. In order to have a sale, the thing must be in existence at the time when title is to pass. "Where a contract is made for the sale and delivery of specified articles of personal property, under such circumstances that title does not vest in the vendee, if the property is destroyed by accident, without the fault of the vendor, so that delivery becomes impossible, the latter is not liable to the vendee in damages for nondelivery. The contract is subject to the implied condition of the continued existence of such thing." *Dexter v. Norton*, 47 N. Y. 62, a leading case followed in *Kein v. Tupper*, 52 N. Y. 550; *Goldman v. Rosenberg*, 116 N. Y. 78; *Stewart v. Stone*, 127 N. Y. 500; *Cameron v. City of Albany*, 207 N. Y. 382. This rule laid down in *Dexter v. Norton*, supra, has been substantially re-enacted in the Sales Act (Pers. Prop. Law), sec. 89. (Laws 1911, chap. 571) sec. 89, is as follows: "1. Where there is a contract to sell specific goods, and subsequently, but before the risk passes to the buyer, without any fault on the part of the seller or the buyer, the goods wholly perish, the contract is thereby avoided. 2. Where there is a contract to sell specific goods, and subsequently, but before the risk passes to the buyer, without any fault of the seller or the buyer, part of the goods perish or the whole or a material part of the goods so deteriorate in quality as to be substantially changed in character, the buyer may at his option treat the contract— (a) As avoided, or (b) As binding the seller to transfer the

property in all of the existing goods or in so much thereof as have not deteriorated, and as binding the buyer to pay the full agreed price if the contract was indivisible, or to pay the agreed price for so much of the goods as the seller, by the buyer's option, is bound to transfer if the contract was divisible."

Q. A and B make an agreement, whereby A is to deliver to B a quantity of wheat, and B is to give him one barrel of "first rate superfine flour" for every four bushels of wheat so delivered. A delivers 500 bushels of wheat under the agreement at B's mill. A few days thereafter, the mill containing the wheat is destroyed by fire. A demands the quantity of flour which he is entitled to under the agreement, and upon B's failure to deliver the same, brings suit. B sets up the destruction of the wheat as a defense. Judgment for whom and why?

A. Judgment for A, as the terms of the contract imported a sale of the wheat; title passed and the property was at the risk of B. "There is nothing in the contract, that expressly or by implication obliged the defendants to deliver to the plaintiff flour manufactured from his wheat to the exclusion of any other in their possession, or which they might subsequently obtain. The agreement on their part, was satisfied by the delivery of a barrel of 'first rate superfine flour' for every four bushels of wheat received from plaintiff, whether manufactured at their mill or elsewhere, obtained by purchase or otherwise. This is a controlling circumstance to show that the parties intended a sale or exchange, and not a bailment. The distinction between an obligation to restore the specific thing received, in the same or an altered form, or of returning others of equal value in the same or a different form, is the distinction between a sale and a bailment." *Norton v. Woodruff*, 2 N. Y. 153. See also *Crosby v. D. & H. Canal Co.*, 119 N. Y. 334; *Sattler v. Hallock*, 160 N. Y. 291; *Hargreave Mills v. Gordon*, 137 App. Div. 701.

Q. A rented a farm with ten cows thereon to B, with the agreement that B at the termination of the lease was to leave ten cows thereon of equal value. The cows died from disease. On whom does the loss fall?

A. The loss falls on B. From the terms of the agreement, the same cows delivered were not to be returned, but B was at liberty to return others of equal value, therefore title passed to him, and the cows were at his risk. *Smith v. Clark*, 21 Wend. 83; *Mallory v. Wills*, 4 N. Y. 76.

Q. A brewer sold and delivered 50 barrels of ale bearing his brand to a retailer, upon the agreement that the barrels were to be returned after the ale was drawn, but if any were not returned, he should pay \$2 a piece for them. B returns 25 of the barrels, and is about to return the rest, when they are attached by a creditor of his (B). The brewer claims the barrels as his. What are the rights of the parties?

A. The brewer is entitled to the barrels; this is a mere bailment, and not a sale of the barrels. In *Westcot v. Thompson*, 18 N. Y. 363, a case exactly in point, it was held that the property in the barrels remained in the vendor, and that the specification of the value operated not to give an election to the vendee to retain them at that price, but to fix damages in respect to such as he should be unable to return.

Q. A delivers a mare to B, with the understanding that if at the end of two months B is satisfied with the mare, he (B) is to have title to her on the payment of \$500. While in possession of B, and through no fault of his, the mare took sick and died. A brings action against B to recover the value of the mare. Judgment for whom and why?

A. Judgment for B, as this was a bailment with the privilege of purchase, and not a sale. In the absence of negligence or want of care on the part of the bailee, he is discharged from liability, and the loss must fall upon him who has the title. Where the property is delivered for the purpose of trial, with the agreement that if it is satisfactory, the receiver will retain it, and pay an agreed price for it, the transaction is considered to be a bailment until the receiver exercises his privilege to purchase; it then becomes a sale. Title does not pass until exercise of the option by the receiver. *Whitehead v. Vander-*

bilt, 10 Daly, 214; *K. Co. v. Romero*, 36 Misc. 384; *Carter v. Wallace*, 32 Hun, 384. Section 100 of the Sales Act, Rule 3, par. 2, continues this rule as follows: "When goods are delivered to the buyer on approval or on trial or on satisfaction, or other similar terms, the property therein passes to the buyer— (a) When he signifies his approval or acceptance to the seller or does any other act adopting the transaction; (b) If he does not signify his approval or acceptance to the seller, but retains the goods without giving notice of rejection, then if a time has been fixed for the return of the goods, on the expiration of such time, and if no time has been fixed, on the expiration of a reasonable time. What is a reasonable time is a question of fact."

Q. A sells B 500 bales of cotton, upon the agreement that if the cotton is not satisfactory for the purpose of B's business, he can return the same. A sends the cotton to B, who duly received the same. A few days thereafter it is destroyed by fire. B refuses to pay for the cotton, claiming that A must bear the loss. A brings suit. Judgment for whom and why?

A. Judgment for A. "Contracts of sale made on condition that the property may be returned at the option of the buyer, carry the title to the buyer. The act of returning the goods is a condition subsequent which may, if performed, defeat the title already vested. If the right of return is not duly exercised, and the property is retained, the right is forfeited and the sale becomes absolute. Where the contract prescribes the time within which a return must be made, that time controls; and if no time is stated, then the vendee must return the goods within a reasonable time." *Costello v. Herbst*, 18 Misc. 176. In the question put, the transaction was a sale with the privilege of return, and title passed to B; therefore the loss falls upon him. See also *Greacen v. Pohlman*, 191 N. Y. 493; *Levis v. Pope Motor Car Co.*, 202 N. Y. 402. This rule has been continued by the Sales Act, sec. 100, Rule 3, par. 1, which is as follows: "When goods are delivered to the buyer 'on sale or return,' or on other terms indicating an intention to make a present sale, but to give the buyer an option to return the goods

instead of paying the price, the property passes to the buyer on delivery, but he may revest the property in the seller by returning or tendering the goods within the time fixed in the contract, or, if no time has been fixed, within a reasonable time."

Q. B owes A certain money and gives him a chattel mortgage to secure the payment of the debt. There was a default made. What steps should A take to foreclose the mortgage?

A. A chattel mortgage is a conditional sale, and title to the property passes to the mortgagee on default. The mortgage is foreclosed by a sale under the power of sale, which is given in the instrument. The mortgage may be foreclosed by an action to foreclose a lien upon a chattel under secs. 206-210, inclusive, of the Lien Law (Consolidated Laws, chap. 33). *Foraci v. Maller*, 154 App. Div. 303.

Q. A pledges a diamond with B for the loan of \$100. A defaults. What proceedings should B take in realizing upon the jewel?

A. Section 200 of the Lien Law, provides as follows: "A lien against personal property, other than a mortgage upon chattels, if in the legal possession of the lienor, may be satisfied by the public sale of such property according to the provisions of this article." Section 201 provides: "That notice of sale must be given to the pledgor." Section 202 provides: "That the sale must be advertised." Sections 203 and 204 provide for a redemption and the disposition of the proceeds, the pledgor to receive the surplus remaining after satisfying the lien. *Behen v. Kingsbury*, 113 App. Div. 555.

Q. B, a paper manufacturer, contracts orally with A, a newspaper publisher, to manufacture and deliver to him twenty tons of paper in sixty days. B does not deliver the paper according to the agreement, and in a suit by A, sets up the Statute of Frauds as a defense. Is it good?

A. The action is not maintainable. The distinction drawn between sales of goods in existence at the time of the making of

the contract under an agreement to manufacture goods in the cases before the Statute (*Sewall v. Fitch*, 8 Cowen, 215; *Parsons v. Loucks*, 48 N. Y. 17) has been abolished by the Sales Act, sec. 85 of the Pers. Prop. Law, and all such cases are now within the Statute of Frauds. Section 85, Pers. Prop. Law (new Statute of Frauds), is as follows: "1. A contract to sell or a sale of any goods or choses in action of the value of fifty dollars or upwards shall not be enforceable by action unless the buyer shall accept part of the goods or choses in action so contracted to be sold or sold, and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract or sale be signed by the party to be charged or his agent in that behalf. 2. The provisions of this section apply to every such contract or sale, notwithstanding that the goods may be intended to be delivered at some future time or may not at the time of such contract or sale be actually made, procured, or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery; but if the goods are to be manufactured by the seller especially for the buyer and are not suitable for the sale to others in the ordinary course of the seller's business, the provisions of this section shall not apply. 3. There is an acceptance of goods within the meaning of this section when the buyer, either before or after delivery of the goods, expresses by words or conduct his assent to becoming the owner of those specific goods."

Q. A goes to the lumber yard of B and selects certain lumber to be delivered to him at his carpenter shop. The price agreed upon was \$500. B also agreed to cut the lumber in certain sizes. The agreement was oral. B tenders the lumber cut as directed, to A, who refuses to receive the same. In an action by B for the purchase price, A sets up the Statute of Frauds as a defense. Is this a valid defense?

A. The defense is good, as the facts show this to be a sale of merchandise for more than fifty dollars, and therefore within

the Statute of Frauds. It is not a contract for work, labor and services, as the articles were in existence at the time of the order, and merely required some change to suit the buyer's purposes. *Cooke v. Millard*, 65 N. Y. 352, a leading case, which as will be seen by an examination of the new Statute of Frauds (sec. 85, *supra*) is unaffected in so far as the decision goes. Of course the distinction between contracts of manufacture and sales of goods in existence as we have seen no longer exists under the new statute except that contracts to manufacture goods especially for the buyer, and not salable in the ordinary course of business by the seller are not affected by the statute.

Q. A hires B by oral contract to make four carriages for him for \$500, to be finished and delivered within six months. B is to furnish the material, and do the work, the carriages to be made in a way that A has directed. B does not perform. What are the rights of the parties? Is the contract within the Statute of Frauds?

A. This contract does not come within the Statute of Frauds, as it is merely a contract to manufacture especially for the buyer. A can therefore maintain the action for breach of contract. Section 85, *supra*.

Q. A purchases from B several lots and styles of hats, at different prices, but on the same day, amounting in all to \$85, the lots averaging from \$10 to \$15 each. The goods are to be shipped by Adams Express. B delivers the goods to the express company. A does not take the goods on their arrival at his place of business. B sues for the price. A sets up the Statute of Frauds as a defense. Judgment for whom and why?

A. Judgment for A. The contract is entire, and therefore within the Statute of Frauds. A delivery to a carrier specified in a parol contract of sale, does not take it out of the operation of the statute, there must be an acceptance by the vendee or by his authorized agent, and an authority to receive for transportation carries with it no implied authority to accept.

Allard v. Greasert, 61 N. Y. 1; Wilcox Co. v. Green, 72 N. Y. 17; Pierson v. Crooks, 115 N. Y. 539. The rule laid down in these cases has not been affected by the new statute.

Q. A owning certain bonds of a realty company, sold them to B in May, 1907, promising B that if at any time he, B, became dissatisfied with the bonds, he, A, would on thirty days' notice take them back and return the money B paid for them. In November, 1907, the affairs of the realty company looking panicky, B wrote to A that he was dissatisfied, and gave thirty days' notice that he required A to take the bonds back and refund the purchase price. Thereafter B tendered the bonds and demanded the money paid therefor, which A refused to pay. B brought action against A to recover the amount. A defended on the ground that the contract not being in writing was void under the Statute of Frauds. What was the decision of the court?

A. The defense must fail as the contract was not within the Statute of Frauds; it was simply an agreement to rescind, not a separate sale. Fitzpatrick v. Woodruff, 96 N. Y. 561. "An oral contract, by which a person sells his own chattels or choses in action for more than \$50, payment and delivery being made, and agrees to take them back from and repay the purchase price to the purchaser on demand, is an entire contract, and the promise to take back the property and repay the purchase price is not void under the Statute of Frauds." Johnston v. Trask, 116 N. Y. 136. These cases have not been affected by the new statute.

Q. A agrees to deliver to B one hundred cases of milk bottles during April 1914, two hundred during May and three hundred during June, 1914. He delivers the hundred cases in April but fails to deliver the balance and then sues for the price of the hundred cases delivered. Can he recover? If so on what ground?

A. Under the old law as laid down in the cases before the

statute (*Champlin v. Rowley*, 13 Wend. 258; *Catlin v. Tobias*, 26 N. Y. 217) no recovery was allowed either in contract or in quasi contract, on the ground that the contract was entire and called for an entire performance, and until such performance was made or tendered there was no liability on the part of the defendant. Under the new Sales Act (sec. 125, Pers. Prop. Law.), it seems that recovery could be had for the fair value of the goods received, although it is not expressly stated, yet the inference is such from the language of the statute. Section 125 of the Sales Act is as follows: "Where the seller delivers to the buyer a quantity of goods less than he contracted to sell, the buyer may reject them, but if the buyer accepts or retains the goods so delivered, knowing that the seller is not going to perform the contract in full, he must pay for them at contract price. If, however, the buyer has used or disposed of the goods delivered before he knows that the seller is not going to perform his contract in full, the buyer shall not be liable for more than the fair value to him of the goods so received. 2. Where the seller delivers to the buyer a quantity of goods larger than he contracted to sell, the buyer may accept the goods included in the contract and reject the rest, or he may reject the whole. If the buyer accepts the whole of the goods so delivered he must pay for them at the contract rate. 3. Where the seller delivers to the buyer the goods he contracted to sell mixed with goods of a different description not included in the contract, the buyer may accept the goods which are in accordance with the contract and reject the rest, or he may reject the whole. 4. The provisions of this section are subject to any usage of trade, special agreement, or course of dealing between the parties."

Q. A bought 500 bushels of wheat from B, being a part of a large quantity stored in an elevator in charge of C. A paid for the wheat in full, and took from B a receipted bill therefor, together with an order from B to C to deliver the wheat to A. Before the wheat was delivered or separated from the other wheat in the elevator, the whole was burned. A demanded his wheat and brought action against B to recover back his pur-

chase money. Was he entitled to recover? State your reasons in full.

A. No. The title passed to A, and he must therefore bear the loss. The payment in full and the execution of the receipt for the price together with the order to deliver, sufficiently showed an intent to pass title without actual separation or delivery of the grain. "Upon the sale of a specified quantity of wheat or grain, its separation from a mass, indistinguishable in quality or value in which it is included, is not necessary to pass title where the intent to do so is otherwise clearly manifested. Articles of this nature are sold, not by a description which refers to and distinguishes the particular thing, but in quantities, which are ascertained by weight, measure or count; the constituent parts which make up the mass being indistinguishable from each other by any physical difference in size, shape, texture or quality. Of this nature are wine, oil, wheat and the other cereal grains, and the flour manufactured from them. They can be identified only in masses or quantities, and in that mode, therefore, they are viewed in the contracts and dealings of men. Where the quantity and the general mass from which it is to be taken are specified, the subject of the contract is thus ascertained, and it becomes a possible result for the title to pass, if the sale is complete in all its other circumstances." Comstock, J., in *Kimberly v. Patchin*, 19 N. Y. 330, the leading case on the subject. So also *Russell v. Carrington*, 42 N. Y. 118; *Gourd v. Healy*, 206 N. Y. 432. This rule is continued without change by sec. 87 of the Sales Act.

Q. A wrote an order to B as follows: "Send me, by Adams Express, at once 500 cases Gold Medal Brand Soap." B at once sent to A by Adams Express, as requested, 400 cases of the above named soap, stating that the remaining 100 cases would follow in ten days; 400 cases shipped were lost in transit, and B sues A for their value, claiming that he delivered them to the express company, as A's agent, at A's request, and that A must stand the loss. What should be the decision of the court?

A. B cannot recover as the delivery of a smaller quantity than that ordered does not pass title to the buyer, therefore the goods were at B's risk. *Bruce v. Pearson*, 3 Johns. 534; *Brown v. Martin*, 50 Hun, 248; *Hilton Lumber Co. v. Sizer*, 137 App. Div. 661. This rule continues the same under sec. 100 of the Sales Act, *supra*.

Q. A sold to B 100 bushels No. 2 red wheat, and 200 bushels of the same to C to be delivered at A's warehouse. B paid in full for the amount of his purchase, but C did not. A measured out the respective amounts which were to await B's and C's orders, and shortly thereafter the warehouse and its contents were destroyed by fire. On whom does the loss fall?

A. The loss must fall on B and C. Title had passed to them, as A the seller had done all that he was supposed to do, and delivery was complete. "It is the general rule that a mere contract for the sale of goods where nothing remains to be done by the seller before making delivery, transfers the right of property, although the price has not been paid nor the goods sold delivered to the purchaser." *Bradley v. Wheeler*, 44 N. Y. 495. See also *Bissell v. Balcom*, 39 N. Y. 275; *Van Brocklen v. Smeallie*, 140 N. Y. 70. Section 100 of the Sales Act continues this rule and provides in part as follows: "Rule 1. Where there is an unconditional contract to sell specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made and it is immaterial whether the time of payment, or the time of delivery, or both, be postponed."

Q. A, who was a merchant in New York, received from B of Chicago an order for certain goods to be sent by the Penn. R. R. Co. A delivered the goods to the railroad company consigned to B according to the order. The goods were lost en route. A brings suit against the railroad company. The company demurs on the ground that he is not the proper party plaintiff. Judgment for whom and why?

A. Judgment for the railroad company. On the delivery to

the carrier the title passes absolutely to the consignee, and the plaintiff (consignor) cannot maintain an action for their loss. *Krulder v. Ellison*, 47 N. Y. 36; *Mee v. McNider*, 109 N. Y. 500; *White v. Schweitzer*, 147 App. Div. 544. This rule has not been changed by the Sales Act, sec. 100, and sec. 127.

Q. A ordered certain goods of B. B ships the goods C. O. D. by the American Express Co. The vessel by which the goods were shipped was lost at sea. Who must bear the loss? Give your reasons.

A. The loss must fall upon A as the title passes to the buyer under the Sales Act, even when the goods are shipped C. O. D. This changes the former rule, as laid down in the cases before the statute. *Baker v. Bourcicault*, 1 Daly, 23. Section 100, Rule 4, par. 2, provides as follows: "Where, in pursuance of a contract to sell, the seller delivers the goods to the buyer, or to a carrier or other bailee (whether named by the buyer or not) for the purpose of transmission to or holding for the buyer, he is presumed to have unconditionally appropriated the goods to the contract, . . . This presumption is applicable, although by the terms of the contract the buyer is to pay the price before receiving delivery of the goods, and the goods are marked with the words 'collect on delivery' or their equivalents."

Q. A orders goods of B, to be delivered to A at Syracuse, N. Y., where A's place of business is located. B shipped the goods, but they are lost before reaching Syracuse. Who must bear the loss?

A. B must bear the loss as the title did not pass to A, the consignee, before the goods reached the destination agreed upon. *Pacific Iron Works v. R. R. Co.*, 62 N. Y. 272; *Krulder v. Ellison*, *supra*; *Gass v. Astoria Mills*, 121 App. Div. 182. These decisions as to delivery at a particular place have not been changed by Rule 5 of sec. 100 of Sales Act, which provides as follows: "If the contract to sell requires the seller to deliver the goods to the buyer, or at a particular place, or to pay the

freight or cost of transportation to the buyer, or to a particular place, the property does not pass until the goods have been delivered to the buyer or reached the place agreed upon."

Q. The defendant sold to the plaintiff a horse. It turns out that the defendant was not the true owner but had purchased it from a thief. The sale to the plaintiff was without a warranty. Plaintiff sues to recover the price paid. Has he a cause of action?

A. Yes. Plaintiff can recover. In sales of personal property where the vendor at the time has possession, a warranty of title is implied. *Burt v. Dewey*, 40 N. Y. 233; *McGiffen v. Baird*, 62 N. Y. 329; *McClure v. Central Trust Co.*, 165 N. Y. 108. This is now provided for in sec. 94 of the Sales Act, par. 1, as follows: "In a contract to sell or a sale, unless contrary intention appears, there is (1) An implied warranty on the part of the seller that in case of a sale he has a right to sell the goods, and that in case of a contract to sell he will have a right to sell the goods at the time when the property is to pass." It will be noticed that the statute does not now require that the vendor be in possession of the goods in order that the warranty may arise. To that extent the statute may be said to have modified the former rule as laid down in the above cited cases.

Q. A agrees to deliver 500 tons of coal to B at \$5 per ton, payment to be made in thirty days. A delivers the coal. B fails to make payment in thirty days. He is sued by A and sets up as a defense that the coal was not worth \$5 per ton, but was worth less because of the slate mixed with it, and tendered into court what he considered the reasonable value. At the trial it is established that B had sold part of the coal to his customers. Is B's defense good?

A. B's defense is not good, as there was no warranty here. Where after the discovery of, or an opportunity to discover, any defect in goods delivered under an executory contract of sale, the vendee neither returns or offers to return the property, nor gives the vendor notice or opportunity to take it back, in

the absence of a collateral warranty or agreement as to quality, he is conclusively presumed to have acquiesced and may not thereafter complain of inferior quality. A buyer ordinarily takes the thing sold at his own risk as to quality. Caveat emptor is the general rule. *Coplay Iron Co. v. Pope*, 108 N. Y. 412. "Where the vendee of goods purchased without warranty, after full opportunity for inspection, accepts them without objection when delivered, he cannot in an action against him to recover the price, defend on the ground that they did not conform to the contract of sale." *Smith v. Coe*, 170 N. Y. 162. This general rule has not been changed by the Sales Act as will be seen from an examination of sec. 93, defining express warranty, which is as follows: "Any affirmation of fact or any promise by the seller relating to the goods is an express warranty if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon. No affirmation of the value of the goods, nor any statement purporting to be a statement of the seller's opinion only shall be construed as a warranty."

Q. A sells B certain goods and warrants them to be of a certain quality. The goods are delivered. B sells the goods at retail in his store. B sues for breach of warranty. A answers, setting up the fact that B retained the goods as a defense. Judgment for whom and why?

A. Judgment for B. It is well settled that upon the sale and delivery of goods with express warranty, if the goods upon trial turn out to be defective and there is a breach of the warranty, the vendee may retain and use the property and yet have his remedy upon the warranty without returning or offering to return. *Day v. Pool*, 52 N. Y. 416; *Brigg v. Hilton*, 99 N. Y. 517. This rule of course was not affected by the Sales Act, as now all warranties survive acceptance, whether express or implied. Section 130 of the Sales Act, in connection with sec. 150 simply extends the rule so as to include implied warranties, and reserves to the buyer the cause of action for

damages after acceptance in all cases of warranty. Section 130 of the Sales Act reads as follows: "In the absence of express or implied agreement of the parties, acceptance of the goods by the buyer shall not discharge the seller from liability in damages or other legal remedy for breach of any promise or warranty in the contract to sell or the sale. But if, after acceptance of the goods, the buyer fails to give notice to the seller of the breach of any promise or warranty within a reasonable time after the buyer knows, or ought to know, of such breach, the seller shall not be liable therefor."

Q. A sells certain articles to B, at the same time making certain statements which amount to an implied warranty. There are certain obvious defects which B who examined the articles could have discovered. Has B any right of action against A?

A. No. The defect being obvious, B cannot recover upon the warranty. A general warranty does not apply to obvious defects apparent upon ordinary inspection by the buyer. This rule that a warranty does not extend to known or obvious defects was well settled. *Birdseye v. Frost*, 34 Barb. 367; *Bennett v. Buchan*, 76 N. Y. 386; *Studer v. Bleistein*, 115 N. Y. 316. The Sales Act has not changed this rule. Section 96, par. 3, provides as follows: "If the buyer has examined the goods, there is no implied warranty as regards defects which such examination ought to have revealed."

Q. A sells to B dressed beef which he says has not been warmed before being killed. B takes the meat and discovers that it has been warmed before killing. He keeps the meat. A brings suit against him for the purchase price. B sets up a breach of warranty by way of counterclaim. Is the counterclaim good? State your reasons.

A. The counterclaim is good as A's agreement amounted to an express warranty which survived delivery and acceptance. It was not necessary in order to constitute an express warranty that the word "warranty" should have been used; a

positive affirmation as to quality understood and relied upon by the vendee, as such, is sufficient. "No particular phraseology is requisite to constitute a warranty. It must be a representation which the vendee relies upon and which is understood by the parties as an absolute assertion, and not the expression of an opinion. It is not necessary that the vendor should have intended the representation to constitute a warranty." *Fairbanks Canning Co. v. Metzger*, 118 N. Y. 260. This rule remains the same under the Sales Act, sec. 93, *supra*.

Q. A is a manufacturer of cloth. He sells a certain quantity of cloth to B who is a manufacturer of clothing. B uses the cloth and manufactures it into clothing. He subsequently discovers through his customers that the cloth was defective. He brings action against A to recover damages sustained. Can he do so?

A. Yes, B can maintain the action. "On the sale of goods by a manufacturer, a warranty is implied that the articles sold are free from any latent defect growing out of the process of manufacture. The obligation arising from the implied warranty imposed upon the seller of goods manufactured by himself, survives their acceptance if the defects were not discoverable upon inspection by ordinary tests." *Hoe v. Sanborn*, 21 N. Y. 552; *Bierman v. City Mills*, 151 N. Y. 482. This case would be the same under the Sales Act, sec. 96.

Q. A sells certain watches to B by sample. B receives the goods and sells them. In a suit by A for the price, B sets up as a counterclaim that the bulk of the goods did not correspond with the sample, as more than half of the watches contained an inferior movement. Is the counterclaim good?

A. Yes. B can recover damages by way of counterclaim for breach of the warranty which arises on a sale by sample, even though he retained the goods. "Where goods are sold by sample, and there are no circumstances to qualify the transaction, there is an implied warranty that each of the articles shall correspond with the sample." *Leonard v. Fowler*, 44 N. Y.

289. "A contract for the sale of goods which points out a known and ascertainable standard by which to judge the quality of the goods sold, is for all practical purposes a sale by sample. Upon a sale by sample, with warranty that the goods shall correspond with the sample, the vendee is not precluded from claiming and recovering damages for breach of warranty, although he has accepted the goods after an opportunity for inspection." *Zabriskie v. R. R.*, 131 N. Y. 72. See also *Henry v. Talcott*, 175 N. Y. 385. This rule has not been changed by the Sales Act, sec. 97, which provides in part as follows: "In the case of a contract to sell or a sale by sample: (a) There is an implied warranty that the bulk shall correspond with the sample and quality."

Q. A purchased a horse from B giving him in payment therefor a note payable to bearer made by C. At the time of the purchase C had failed but neither A nor B knew it. B comes to you for advice and asks you whether he can recover the value of the note from A. What would you advise him?

A. B can recover from A. "Upon broad principles of justice a man should not be allowed to pay a debt with worthless paper, though both parties supposed it to be good. Here when this loss occurred, the note was the property of the defendants. Why should they not bear their own loss? They seek to pay a debt they honestly owe with that loss, with that worthless paper. Assuming the integrity of both parties, it seems equitable and just that defendants should sustain the loss that occurred while they were bearing the risk, while the note was yet at the risk of no one else." *Peckham, J.*, in *Roberts v. Fisher*, 43 N. Y. 159.

Q. A consigned goods to be shipped to Chicago to B, and then B is to ship them wherever he pleases. The goods reached the depot of the railroad company by which they were carried to Chicago. When A learns that B is insolvent, he demands the goods of the railroad company which refuses to deliver them. What are the rights of the parties?

A. A has no rights to the goods. The right of stoppage has ceased. Stoppage in transitu is the right which the seller has to retake the goods at any time before they come into the possession of the buyer or his agent, when the goods have not been paid for and the buyer has become insolvent. *Buckley v. Furniss*, 17 Wend. 504; *Cross v. O'Donnell*, 44 N. Y. 661; *Babcock v. Bonnell*, 80 N. Y. 244. The railroad company here appears to be the agent of the buyer, and therefore the goods having reached their destination, the right of stoppage is gone. "The delivery of goods to the vendee which puts an end to the state of passage and so deprives the vendor of the right of stoppage in transitu, may be at a place where the former means the goods to remain until a fresh destination is given to them by himself: When they have reached the place for which they were intended under the direction given by the vendee, the right of stoppage ceases." *Becker v. Hallgarten*, 86 N. Y. 167. The Sales Act, secs. 138 and 139, has not altered these rules in respect to stoppage in transitu.

Q. A sold to B 1,000 tons of iron which B wrongfully refused to accept and pay for. A comes to you for advice, and wishes to be informed of his rights. What are his rights and remedies? Answer in full.

A. On the failure of a purchaser to perform a contract for the sale of personal property, the vendor, as a general rule, has the election of three remedies: 1. To hold the property for the purchaser and recover of him the entire purchase money. 2. To sell it after notice to the purchaser as his agent for that purpose and recover the difference between the contract price and that realized on the sale. 3. To retain it as his own, and recover the difference between the contract price and the market price at the time and place of delivery. *Dustan v. McAndrew*, 44 N. Y. 72; *Sawyer v. Dean*, 114 N. Y. 469; *Moore v. Potter*, 155 N. Y. 481. The Sales Act, secs. 141, 142 and 144, has not changed this rule.

Q. The Y Company, jobbers in dry-goods, sold to A, a

merchant, a large quantity of ribbons designed for his fall trade, to be delivered on or before the first day of September, at an agreed price. The goods were not delivered until the 15th of October, and they were accepted by A. The failure of the Y Company to deliver at the agreed time caused serious damage to A's trade, for which A claims damages. What are A's rights?

A. A can recover damages caused by delay in delivery, although he accepted the late delivery, as this was a breach of warranty—failure to deliver the goods on time. The warranty survived acceptance. *Crocker Wheeler Co. v. Varick Co.*, 104 App. Div. 568; *Raymore Realty Co. v. P. N. Co.*, 145 App. Div. 163. This rule remains the same under the Sales Act, sec. 130, *supra*.

Q. A, on June 1, 1906, makes an agreement with B to sell him 500 barrels of flour at \$5 per barrel, to be delivered on July 1. About June 8, flour falls in price and B goes to A and tells him not to send the goods, as he will not take them at the contract price. A, on the next day thereafter, sells the goods to C. Flour in the meantime has advanced to \$6 per barrel, and B on the day following writes to A to send the 500 barrels of flour at once. A consults you as to his rights and remedies. What would you advise him?

A. A need not send the goods, but instead can bring suit immediately (before July 1) against B for breach of contract. "Where before the time of delivery fixed by a contract of sale of goods, the vendee notifies the vendor that he will not receive or pay for the goods and requests him to stop any further efforts to carry out the contract, the vendor is justified in treating the contract as broken at that time, and is entitled to bring an action immediately for the breach without tendering delivery; it is not necessary to await the expiration of the time of performance fixed by the contract, nor can the vendee retract his renunciation of the contract after the vendor has acted upon it and by the sale of the goods to other parties,

changed his position." *Windmuller v. Pope*, 107 N. Y. 674. So also *Nichols v. Scranton Steel Co.*, 137 N. Y. 471; *Stokes v. Mackay*, 147 N. Y. 223. This rule has been re-enacted without change in sec. 145 of the Sales Act.

Q. A, having ordered goods of B, later refuses to accept them. B sues A for nonacceptance. What is the measure of damages?

A. The measure of damages in such case is the difference between the contract price and the market value of the goods at the time and place of delivery. *Cahen v. Platt*, 69 N. Y. 348; *Rindeau v. Bullock*, 147 N. Y. 269; *Lekas v. Schwartz*, 107 N. Y. Supp. 145. This rule is continued by sec. 145 of the Sales Act.

Q. A bought goods from B, receiving a warranty that the goods were to be of a certain quality. When the goods were delivered to A, he discovered that they were inferior in quality. A retained the goods but brought suit against B on the warranty. Can the action be maintained, and if so what is the measure of damages?

A. The action for breach of warranty can be maintained, as all warranties under the statute, survive acceptance; and especially so as in this case where there was an express warranty. The ordinary rule, as to measure of damages, is the difference between the actual value of the goods sold with defects, and the value which they would have had at the time of the sale if they had conformed to the warranty. *Hooper v. Story*, 155 N. Y. 171; *Mathes v. McCarthy*, 195 N. Y. 40; *Miller v. F. R. Mfg. Co.*, 101 App. Div. 22. This rule remains the same under sec. 150 of the Sales Act, pars. 6 and 7.

Q. A bought of B certain dress goods, which B expressly warranted to be of a certain quality, but they turned out to be defective. B neither returned nor offered to return them, and thereafter sold the same in due course at their market value, and lost \$1,500. B is now sued for the contract price and con-

sults you as to his rights to counterclaim his damages. How would you advise him?

A. B has a right to counterclaim his damages, as the warranty survived acceptance (secs. 96 and 130 of the Sales Act) and the remedy by recoupment is expressly given by sec. 150 of the Sales Act as follows: "1. Where there is a breach of warranty by the seller, the buyer may, at his election, (a) Accept or keep the goods and set up against the seller the breach of warranty by way of recoupment in diminution or extinction of the price."

Q. A sold to B a horse for \$200, warranting him to be gentle and kind. The horse was delivered to B, and the agreed price paid. The horse proved to be vicious and unmanageable on the first trial. B at once offered to return the horse to A, and notified that he rescinded the sale and purchase, and demanded that A return to him the \$200 which he had paid. A refused to do so. B comes to you for advice. What are his rights?

A. B had the right to rescind under sec. 150 of the Sales Act, Rule 1, sub-div. (d) which is as follows: "1. Where there is a breach of warranty by the seller, the buyer may, at his election, (d) Rescind the contract to sell or the sale and refuse to receive the goods, or if the goods have already been received, return them or offer to return them to the seller and recover the price or any part thereof which has been paid." This right of rescission given to the buyer by the above sub-section changes the former law. Before the statute the buyer after accepting the goods and taking title, could not, for breach of warranty, return the goods to the buyer and rescind the contract, but was compelled to rely on his right of action for damages, if that had not been extinguished by his acceptance, as in the case of an implied warranty.

Q. A, having knowledge of his insolvency, fraudulently bought of B several cases of hosiery on 30 days' credit. The goods were duly delivered. A was indebted to C at the time, who was also engaged in the hosiery business. C thereafter

purchased of A the above described goods at a fair valuation, for purposes of his business, the purchase price to be applied on his debt. At the time C purchased and received the goods, he had no knowledge of A's insolvency, but believed him to be perfectly solvent, and acted in good faith. Shortly thereafter several of A's creditors obtained judgments against him and issued execution. What are B's rights and remedies?

A. B can replevin the goods, as the sale was induced by A's fraud. C was not a bona fide purchaser for a valuable consideration paid at the time of the sale, he having purchased the goods for an antecedent debt. One who takes goods in payment of an antecedent debt, is not a purchaser for value. *Weaver v. Barden*, 49 N. Y. 286; *Stevens v. Brennen*, 79 N. Y. 254; *LaManna v. Munroe*, 48 App. Div. 495. The New York Sales Act has not changed this rule, as secs. 105 and 156 are both silent on this point. Therefore the law remains as above stated.

(NOTE.) The definition of value given in the Uniform Sales Act is as follows: "Value is any consideration sufficient to support a simple contract. An antecedent or pre-existing claim, whether for money or not, constitutes value, where goods or documents of title are taken either in satisfaction thereof or as security therefor. This definition was omitted from the New York Statute."

CHAPTER XVI

Suretyship and Guaranty

Q. A is surety for the faithful performance of a contract made by B with C. Upon B's default, C immediately brings action against A, who defends on the ground that C should have first exhausted his remedies against B before proceeding against him. Is the defense good?

A. The defense is not good, as the liability of a surety is absolute and unconditional; he is primarily liable. The surety undertakes to pay the debt if the principal does not. He is an insurer of the debt. The surety assumes to perform the contract of the principal if he does not, and if the act which the surety undertakes to perform through the principal is not done, then the surety is liable at once. A person who engages to be answerable for the debt, default or miscarriage of another is a surety. *Pingrey on Suretyship and Guaranty*, pp. 1-5. The general rule is stated in *De Colyar on the Law of Guarantees*, 3d Ed., p. 212, as follows: "Once the principal has actually committed a default, for which the surety is responsible, as a general rule a cause of action immediately arises against the surety. And consequently as a general rule, and in the absence of any express or implied stipulation to the contrary, the creditor need not, before suing the surety, sue the principal debtor, even though such principal debtor be quite solvent." See also *Hayes v. Ward*, 4 Johns. Ch. 123.

Q. A is a guarantor of the payment of a note of B to the order of C. At maturity it is unpaid, and C makes no effort to enforce collection from B. He sues A. Can he recover?

A. Yes, for this is an absolute guaranty. "The defendant has very plainly contracted as guarantor. If he is not liable as

such, he is not liable at all; and if he is liable as such, he cannot get rid of the obligation by calling himself an indorser or anything else. The undertaking of the defendant was not conditional like that of an indorser, nor was it upon any condition whatever. It was an absolute agreement that the note should be paid by the maker at maturity. When the maker failed to pay, the defendant's contract was broken, and the plaintiff had a complete right of action against him. It was no part of the agreement that the plaintiff should give notice of the nonpayment, nor that he should sue the maker or use any diligence to get the money from him. The point was decided long ago that a guaranty of payment, like the one in question, is not conditional, but an absolute undertaking that the maker will pay the note when due. *Allen v. Rightmere*, 20 Johns. 365. The guarantor does not promise to pay himself, but that the maker will pay. The defendant was under an absolute agreement to see that the maker paid the note at maturity. The plaintiff was under no obligation to institute legal proceedings." *Bronson, J., in Brown v. Curtis*, 2 N. Y. 225. See also *Fidelity & Casualty Co. v. Wells*, 49 App. Div. 172; *Bank v. Zimmerman*, 185 N. Y. 218.

Q. A guarantees the collection of a note made by C to B. Upon C's default to pay the same, B immediately sues A without making any effort to get payment from C. Can he maintain the action?

A. No. One who guarantees in general terms the collection of a debt, thereby undertakes that it is collectible by due course of law, and only promises to pay when it is ascertained that it cannot be collected by suit against the principal prosecuted to judgment without unnecessary delay and execution issued thereon. An endeavor to so collect, is a condition precedent to a right of action against the guarantor. The guaranty in question here was not one of payment but of collection. A distinction must be drawn between the two. The one is absolute, the other conditional. *Craig v. Parkis*, 40 N. Y. 181; *McMurray v. Noyes*, 72 N. Y. 524; *Bank v. Sloan*, 135 N. Y. 371; *Vetter v. Welz*, 143 App. Div. 123.

Q. A, an infant, purchased of B certain furniture on credit. C guaranteed the collection of the price therefor. B sued A for the purchase price of the furniture, but the latter pleaded infancy as a defense and the judgment was in his favor. B then sued C on the guaranty, and C pleaded A's infancy as a defense. Was C's defense good?

A. No. The guarantor is held liable in these cases in which the debt is justly owing, although from some defect or incapacity the principal is not liable in any action. "If the principal obligation was annulled only because of some personal exception which the principal debtor had, as if it was a minor, who, in consideration of his being under age, got himself relieved from an obligation by which he suffered some prejudice, and that there had been no fraud on the creditor's part, the restitution of the minor would have indeed this effect, that it would annul his obligation to the creditor, and his engagement to save harmless his surety, if he desired to be relieved from it. But the said restitution of the minor would not in the least invalidate the surety's obligation to the creditor. For it was only to make good the obligation of the minor, in case he should be relieved from it on account of his age, that the creditor took the additional security of a surety." *Kimball v. Newell*, 7 Hill, 116. See also *Erwin v. Downs*, 15 N. Y. 576; *Putnam v. Schuyler*, 4 Hun, 169.

Q. A and B become sureties to C for D, for the same debt. Each executes a separate bond, A's being in the penal sum of \$10,000, and B's in the penal sum of \$30,000. D defaulted in the sum of \$10,000, and C sues A on his bond and compels him to pay the amount thereon. Has A, under the circumstance disclosed, any remedy against B? If so, what? If not, why not?

A. He has a right to compel B to contribute. The rights and obligations of sureties inter sese are the same whether bound in one or several like obligations; where there are several distinct bonds in different penalties, they are bound to contribute

in proportion to the amount of the penalties of their respective bonds. *Armitage v. Pulver*, 37 N. Y. 494. Cosureties are entitled to the right of contribution when they are bound for the performance by the same principal for the same obligation, and whether they become so at the same time or different times by one or several instruments, even if they are bound in different sums, or if each is ignorant that the other is a surety. The obligation of cosureties to contribute to each other has grown out of the rule that equality is equity, and is not founded on the idea of a contract between the sureties. *Aspinwall v. Sacchi*, 57 N. Y. 331; *Wells v. Miller*, 66 N. Y. 255.

Q. A and B are cosureties on a debt of C to D of \$12,000. C fails to pay. A is compelled to pay to D \$8,000, and brings action against B for \$4,000 contribution. Can the action be maintained? State your reasons.

A. He cannot recover \$4,000; he can only compel B to pay him \$2,000, the amount in excess of one-half of the debt. "The obligation of one of two cosureties is to pay the whole debt; if he does so, he may recover of his cosurety one-half; if he pays less than the whole debt, he can recover from his cosurety, the amount he has paid in excess of the moiety." *Morgan v. Smith*, 70 N. Y. 537; *Hard v. Mingle*, 206 N. Y. 187.

(NOTE.) Where there are several cosureties on a debt, and one has paid the debt, upon proof that the other cosureties are insolvent, the one paying the debt may recover a half contribution from the one that is solvent by bringing an equitable action. *Easterly v. Barber*, 66 N. Y. 433; *Kimball v. Williams*, 51 App. Div. 616.

X Q. A is surety to secure the performance of a contract by B to C. C holds a chattel mortgage on property belonging to B as security for the performance of the same contract by B. B defaults and A is compelled to pay the amount of the obligation to C. What right, if any, has A?

A. He is entitled to the possession of the chattel mortgage by right of subrogation. "Where one has been compelled to pay a debt which ought to have been paid by another, he is

entitled to a cession of all the remedies which the creditor possesses against that other." *Schram v. Werner*, 85 Hun, 293. See also *Matthews v. Aikin*, 1 N. Y. 595; *Townsend v. Whitney*, 75 N. Y. 425.

Q. A is surety for B in the sum of \$10,000. B defaults, and A is sued by the creditor. He settles for \$6,000. A then brings action against B to recover the whole \$10,000. Can the action be maintained? State your reasons.

A. A can only recover the amount he has paid. If the surety extinguishes the debt for less than the whole amount due, he can only recover what he actually paid, as the contract between principal and surety is for indemnity only. *Bonney v. Seely*, 2 Wend. 481; *Coleman v. Lansing*, 65 Barb. 54; *Konitzky v. Meyer*, 49 N. Y. 571.

Q. The defendant as surety signed a bond for the faithful performance of a contract of A with a corporation. The corporation paid A in advance. A refuses to perform. The corporation sues A for damages, but the contract is held void by the court, A being compelled to return the money paid to him by the corporation which he is unable to do. The corporation thereupon sues the surety. Is he liable? Give reasons.

A. No. As the contract is void, the surety is released from liability. He merely agreed to be bound on the contract; the money here is to be repaid, not in performance of the contract, but merely as money received under a void contract. The liability of a surety is *strictissimi juris*, which means that a surety shall not be held beyond the precise terms of his contract. *Gates v. McKee*, 13 N. Y. 232; *Bennett v. Draper*, 139 N. Y. 266; *Smith v. Molleson*, 148 N. Y. 241.

Q. A and B, partners in a distillery, executed a bond to the U. S. for the payment of the duties and taxes on distilled spirits, with C as their surety. D at the request of the principals paid the bond, and now sues A, B and C to recover the amount paid

thereon. They consult you. What are their respective rights and liabilities, if any? Give reasons in full.

A. D can recover from A and B, but not from C, as C being a surety only and having no interest in the distillery is not liable. He was only liable on the bond, and after that was paid his liability ceased. "When the bond was once discharged, he had no further concern or interest in the transaction and a payment at the request of one of the obligors, ought not to have a greater operation than an actual payment by that one." *Elmendorph v. Tappen*, 5 Johns. 177. The principle involved in these cases is that the surety's liability is *strictissimi juris*, and will not be extended beyond the precise terms of his contract. *Page v. Krekey*, 137 N. Y. 314.

Q. A is appointed bookkeeper of the X Bank. At the time of the appointment, B executes to the bank a bond conditioned that A will faithfully perform the duties imposed upon him as bookkeeper and the duties of any other office relating to the business of the bank which may be assigned to him. After serving for several years as bookkeeper, B was appointed as receiving teller of the bank, and while acting in that capacity embezzled \$5,000 of the bank's funds. The bank sues B on the bond. Is he liable?

A. No. The surety undertook only for the fidelity of the principal while he was bookkeeper, both in the performance of that office, trust or employment temporarily imposed upon or assumed by him during that time relating to the bank's business, but not for his fidelity in another position to which he was permanently appointed. The liability of a surety is always *strictissimi juris*, and may not be extended by construction beyond his specific engagement. *Nat. Mechanics' Bank Assn. v. Conkling*, 90 N. Y. 116; *Ulster County Sav. Inst. v. Young*, 161 N. Y. 23.

(NOTE.) Where the bond recited, "Or shall be appointed to any other office, duty or employment, he shall also faithfully perform the duties of that office," it was held that the surety was liable for misappropriation by the principal after appointment to that office. *Bank v. Spinney*, 120 N. Y. 560.

Q. A became surety to B's bank for the faithful performance of the duties of X as bookkeeper. X was allowed to take the teller's place every day during the dinner hour of the latter, and while acting as teller he stole \$10,000. A is sued on the bond and claims that he is not liable. Judgment for whom and why?

A. Judgment for the bank. "A bond conditioned that the principal obligor shall faithfully discharge 'the trust reposed in him as bookkeeper' of a bank, extends to his honesty as well as his reasonable skill and diligence. It is no defense to the surety, that, at the time of an embezzlement, the principal was employed in performing a duty usually assigned to the teller." *Rochester City Bank v. Elwood*, 21 N. Y. 88; *Mayor of New York v. Kelly*, 98 N. Y. 471.

Q. A is employed in the X Bank. He takes and appropriates to his own use from the bank's funds \$1,000. This is afterwards discovered and A makes restitution of the amount. He is retained in the bank's employ on condition that B become surety for him. B becomes his surety without knowledge of the former embezzlement, and the bank knows that B does not know of it. A afterwards embezzles \$2,000 and absconds. The bank brings action against B as surety on the bond. Judgment for whom and why?

A. Judgment for B. "Where an employer takes a bond as security for the fidelity of his agent, who, to the knowledge of the employer has previously violated the trust put in him, and the employer does not disclose such fact or misconduct to the surety, he is guilty of the fraudulent concealment of a material fact, which good faith requires him to disclose, and he cannot recover of the sureties the damages resulting from a subsequent default of his agent." *U. S. Life Ins. Co. v. Salmon*, 91 Hun, 535, *aff'd* in 157 N. Y. 682. See also *Howe Machine Co. v. Farrington*, 82 N. Y. 121; *Bostwick v. Van Voorhis*, 91 N. Y. 353.

Q. A was surety on a bond to the First National Bank of Buffalo for no definite time, conditioned for the faithful per-

formance by B of his duties as cashier of the bank. He had been appointed and held the position of cashier on the strength of the bond. After it had been running for four or five years, A notified the bank that he revoked the same and considered himself no longer liable thereon. The bank refused to consider his release from his liability thereon and so informed him. Thereafter B becomes a defaulter and the bank seeks to hold A on his bond. A consults you. What would you advise? Give your reasons.

A. A is not liable on the bond. "A surety bound for the fidelity and honesty of his principal, and so for an indefinite and contingent liability, and not for a sum fixed and certain to become due, may revoke and end his future liability in either of two cases, viz.: 1. When the guaranteed contract has no time to run; 2. Where it has such definite time, but the principal has so violated it and is so in default that the creditor may safely and lawfully terminate it on account of the breach. Where the person employed commits an act of dishonesty and is unfaithful to his trust, the employer may end the contract and trust for his own protection, and what he may do and ought to do for his own safety, the surety may require to be done for his." *Emery v. Balz*, 94 N. Y. 414. See also *Picker v. Fitzelle*, 60 App. Div. 451; *Vidi v. United Surety Co.*, 155 App. Div. 505.

Q. A was appointed to the position of cashier of the Federal Trust Company, and before entering upon his duties was required to give a bond to the said company for the faithful performance of his duties as cashier in the sum of \$10,000. He asked B to become surety upon the bond but B refused unless C would first sign the bond as surety. Thereafter A presented the bond to B purporting to bear the signature of C as surety, and requested B to sign as surety, which B did. A defaulted and the company brought action against A, B and C on the bond. B defended on the ground that he only became surety believing that the signature of C was genuine and that C's signature was a forgery. Is B's defense good? Give reasons.

A. B's defense is not good. It is not competent to prove that the surety was induced to execute the bond by the fraud of his principal, unless the obligee was connected with the fraud and as the trust company here was entirely ignorant of the forged signature it can recover. *Coleman v. Bean*, 3 Keyes, 94; *Mosher v. Carpenter*, 13 Hun, 602.

Q. A was surety for B on a contract made with C. C being about to enforce the contract, and B not being able to pay at the time, agreed to extend B's time one year, and did so without the knowledge of A. Subsequently C seeks to hold A liable as surety, B having defaulted. Is he liable or not, and why?

A. A is not liable. The rule is that an extension of time, upon a valid and binding agreement, without the consent of the surety, discharges him from liability on the ground that his position is jeopardized thereby. The creditor, in giving time to the principal debtor, deprives the surety of the right which he would have had from the mere fact of entering into the position of a surety, that is, the right to proceed against the principal, and if this right be suspended, no matter for how short a time, and not injuring the surety at all, and even actually benefiting him, nevertheless it is established that this discharges the surety altogether. *Rathbone v. Warren*, 10 Johns. 587; *Caloo v. Davies*, 73 N. Y. 211; *Spies v. Bank*, 174 N. Y. 222; *Nat. Park Bank v. Koehler*, 204 N. Y. 174.

Q. A was surety, B principal and C creditor on an obligation. B asks C to refrain from suing or pressing his claim until he (B) should be able to pay the same. C said he would be patient, but would not agree to give him any time. When the obligation was due, B was solvent, but became insolvent soon after. The surety had no knowledge of the conversation. Upon B's default, C brings action against the surety to recover the debt. Judgment for whom and why? State your reasons.

A. Judgment for C; A is not discharged. A mere indulgence to the debtor will not discharge the surety; there must be an agreement to extend the time of payment binding on the

creditor. *Lowman v. Yates*, 37 N. Y. 601; *McKechnie v. Ward*, 58 N. Y. 541. "To have the effect of discharging the surety, an agreement for the extension of time of payment made by the creditor with the principal debtor without the consent of the surety, must be upon a valid consideration, such as will preclude the creditor from enforcing the debt against the principal debtor." *Olmstead v. Lattimer*, 158 N. Y. 313.

Q. A and B, who were in business as copartners, agreed upon a dissolution of their business, wherein B was to take all the firm's property and pay all the firm's debts. C, a firm creditor who knew of the dissolution, took B's negotiable promissory note payable in two months, as full settlement of a firm debt. B was at that time solvent. The note not being paid at maturity, and B becoming insolvent, C returned the note to B and brought suit against A and B as copartners on the original debt. What do you say as to the liability of A, and can C recover against him?

A. C cannot recover against A, as he became a surety by the dissolution agreement, and he became released by the extension of time granted. "Where one of two copartners purchases the interest of the other in the partnership property, and assumes and agrees to pay the partnership debts, as to such debts the former becomes in equity the principal debtor and the latter a surety; and this relationship a firm creditor having notice of the agreement is bound to observe." *Colgrove v. Tallman*, 67 N. Y. 95. And an extension of the time of payment of a debt granted by the creditor to a principal debtor acts as a discharge of a surety of the debt, from his liability thereon. *Millerd v. Thorn*, 56 N. Y. 402.

Q. A, who is surety for B, requests C, the creditor, to sue B, the principal debtor, but the creditor neglects to do so. Two years thereafter the creditor sues, but the debtor is then insolvent. C then brings action against A to enforce his liability as surety. A sets up as a defense his request to sue. Judgment for whom and why?

A. Judgment for A. A surety may require the creditor to proceed against the principal and enforce collection of his demand by action if not otherwise paid, and a failure to so proceed within a reasonable time will operate to discharge the surety if he suffers injury by such delay. Solvency of the principal at the time of the demand to sue, and his subsequent insolvency after neglect to institute suit will discharge the surety from his obligation. But the notice to the creditor must be clear and explicit, and he must be given to understand that he is required to sue, otherwise the surety will not be discharged. A mere notice to collect would not be sufficient. The notice by the surety to the creditor should clearly inform him that he is required to take proceedings in the courts to enforce the obligation. *Pain v. Packard*, 13 Johns. 174; *Goodwin v. Simonson*, 74 N. Y. 133; *Coykendall v. Constable*, 48 Hun, 360, *aff'd* in 117 N. Y. 627; *Hunt v. Purdy*, 82 N. Y. 486.

Q. A is surety for the firm of B and C on a bond to the extent of their purchases. Without A's knowledge another partner is taken into the firm, and subsequently A is sued on the bond. Can he be held liable? If so, why so? If not, why not?

A. A cannot be held liable as he did not bind himself as surety for the new firm. "In the absence of terms in a guaranty given for a partnership, showing that the parties intended that it should survive changes in the firm, the guaranty terminates with the existence of the firm for which it was given, and does not continue for the benefit of any firm or party succeeding to its business." *Bennett v. Draper*, 139 N. Y. 266.

Q. A became surety for B who was indebted to C in the sum of \$2,000. C also had as security for the debt some bonds of the X Trust Company. When the debt came due B tendered to C the amount of the indebtedness, but as C did not need the money, he told B not to pay then. Thereafter the bonds became worthless and B insolvent. After tendering the bonds to A, C demanded payment of the debt from him. Upon the above facts can C recover from A? Answer fully.

A. A is released from liability. A surety cannot be held liable for nonperformance of his contract, if it has resulted from a request by the creditor to the principal not to pay the debt at the time, when it became due, as this is a fraud upon the surety. *Sailly v. Elmore*, 2 Paige, 497; *Lynch v. Reynolds*, 16 Johns. 41.

Q. A was the guarantor of the payment of rent by B under a lease of certain premises from C. There was a clause in the lease to the effect that at the expiration of the lease which was for two years, B, the lessee, had the privilege to renew said lease upon thirty days' notice to the lessor. B notified C in proper time and C thereupon indorsed renewal for three years upon the lease. There was a default in the payment of the rent for the extended time, and C brings action against A on the guaranty. A defends on the ground that he was only liable for the term of the lease. Judgment for whom and why?

A. Judgment for A as he was only liable for the rent accruing during the term given in the original lease, and not for that which might fall due under any renewal thereof which B might elect to take. Where a surety has contracted for a definite term he cannot be held liable for defaults occurring after the time has expired. Strict rules of construction are applied in favor of the surety. "This lease does not contain a continuing guaranty for payment by the surety; it is not so written in words and we think is not open to a construction binding the surety for a term to be named in a 'renewal.' (*Rutgers v. Hunter*, 6 Johns. Ch. 218.) The surety did not stipulate or covenant that his liability should continue over a three years' longer term if the tenant elected to take and receive a renewal." *Knowles v. Cuddeback*, 19 Hun, 593. See also *Hamilton v. Rensselaer*, 43 N. Y. 244.

Q. A and B, husband and wife, executed a mortgage to C for \$5,000 as security for a pre-existing debt of A's. The mortgage is given on a piece of property belonging to A. A fails to pay the mortgage debt at maturity. C forecloses and the property

is sold by order of the court, the amount realized being just sufficient to pay the mortgage and costs. B demands certain bonds which were held by C as security for the debt previous to the giving of the mortgage. C refuses to comply with the demand. What are the rights of the parties?

A. B has no rights to the bonds, she, merely having released her dower in the mortgaged premises, is not in the position of a surety, and therefore is not entitled to the right of subrogation. "She cannot be treated as the surety of her husband, because she joined with him in a mortgage of his lands; she can only release her dower, but is entitled to dower in the equity of redemption." *Hawley v. Bradford*, 9 Paige, 200. See also *Durnherr v. Rau*, 135 N. Y. 222.

Q. A was the principal debtor and B the surety on an obligation held by C. C had collateral given him by A to further secure the debt. On A's default, B, the surety, pays the debt. C in the meantime has lost the collateral. B consults you as to his rights. What would be your advice?

A. B can recover the value of the collateral from C. "A creditor who by himself or by his agents, so deals with securities to which a surety may be entitled by way of subrogation, as to lose or destroy them is liable for the value of the securities to the surety paying the debt, or whose property is resorted to for the purpose of securing payment thereof." *Sternbach v. Friedman*, 34 App. Div. 534.

Q. A was surety for the faithful performance of a contract by B with C. B gives C certain bonds as security for the debt. At the maturity of the debt, B failing to pay, C sues A for the amount of the debt, and A pays the same. C thereupon returned the bonds to B, who sold the same and is now insolvent. A claims the securities or their value from C, who informs him that he has surrendered them to B. What are the rights of the parties?

A. A is entitled to the securities by reason of his having

paid the debt, by virtue of the right of subrogation. C having surrendered the securities, is liable for their value to A. "The rule that a surety is discharged *pro tanto* through the surrender of the securities by the creditor, does not rest on contract, but upon the equitable principle that the property of the debtor pledged for the payment of the debt, should be applied on the debt. In such a case, the surety is discharged to the extent he is injured." *State Bank v. Smith*, 155 N. Y. 185.

Q. A buys a suit of clothes from a tailor, on one month's credit. Afterwards B writes the tailor that he will pay for the clothes if A does not. Is this promise binding?

A. No, for a guaranty being a contract to answer for the debt, default or miscarriage of another, must have a consideration to support it. If the debt of the principal debtor be pre-existing, then there must be a new and distinct consideration to sustain the promise of the guarantor. Where the guaranty is made subsequent to the creation of the debt and was not an inducement to it, the consideration of the original debt will not support it, and so there must be some further consideration having an immediate respect to such liability, and it is sufficient that there be something moving towards the principal debtor. *McNaught v. McLaughry*, 42 N. Y. 22; *Harrington v. Brown*, 77 N. Y. 72.

Q. A buys a bill of goods from B. At the same time, C writes on the back of the bill that he guarantees the collection of the within bill. Upon default by A, B sues C for the amount of the bill. C defends on the ground that there was no consideration for his promise. Is his defense good?

A. No. The consideration supporting the sale is sufficient to support the guaranty. *Leonard v. Vredenburg*, 8 Johns. 38. "Where a contract of guaranty is entered into concurrently with the principal obligation, a consideration which supports the latter, supports the former and the consideration need not be expressed in the guaranty, but may be shown by *parol*." *Bank v. Coit*, 104 N. Y. 532.

Q. A goes to a jewelry store to purchase a watch on credit. The jeweler, not knowing A, refuses to give it to him, whereupon B, who happens to be in the store at the time, says he will pay for it if A does not. A fails to pay, and the jeweler sues B, who sets up the Statute of Frauds as a defense. Is this defense good?

A. The defense is good, as the promise here was clearly one to answer for the debt, default or miscarriage of another, or in other words a guaranty, which in order to be binding must be in writing and subscribed by the party to be charged (the guarantor), according to sec. 31 of the Personal Property Law (Consolidated Laws, chap. 41), which in part is as follows: "Every agreement, promise or undertaking is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent, if such agreement, promise or undertaking. 2. Is a special promise to answer for the debt, default or miscarriage of another person."

Q. A hires B, a contractor, to build a certain house for him. The workmen, becoming dissatisfied, go upon a strike, and A, being anxious to have his house finished in the fall, tells the workmen that if they will go on with the work, he will see them paid. The men comply with his request, and upon completion of the work bring suit against him on his promise. A sets up the Statute of Frauds as a defense. Is the defense good?

A. No. "A promise made by the owner of a house, which a contractor was engaged in constructing, to workmen employed by the contractor that if the workmen will proceed with their work, the owner would seem them paid, is an original undertaking and is not within the Statute of Frauds, notwithstanding the fact that the liability of the contractor to the workmen is not affected thereby." *Almond v. Hart*, 46 App. Div. 431. "An oral promise by officers of a corporation which was interested in a building under construction by an independent con-

tractor, to pay for building material if furnished to the contractor, is void under the Statute of Frauds." *Roscoe Lumber Co. v. Reynolds*, 124 App. Div. 539. In this case the court distinguishes it from *Almond v. Hart*, *supra*, by saying, "There the promisors were the owners of the building and the promise was an original undertaking, while in the case at bar defendants were merely the officers of a corporation which had an interest in the building; they undertook by a collateral promise to answer for the debt of a third person; it was not their debt, and the same would have been true if the indebtedness had been that of the corporation of which they were officers."

Q. A is about to contract with C; the latter will not contract unless B will become a surety for A. B will not go surety for A, unless D will agree to indemnify him against any loss. The agreement between B and D is by parol. B, who is obliged to perform, brings action against D, who sets up the Statute of Frauds. Is the defense maintainable on that ground?

A. No, as this is an original undertaking. A verbal promise by one person to indemnify another for becoming a guarantor for a third person, is not within the Statute of Frauds, and need not be in writing, and the assumption of the liability is a sufficient consideration for the promise. *Chapin v. Merrill*, 4 Wend. 657; *Sanders v. Gillespie*, 59 N. Y. 250; *Tighe v. Morrison*, 116 N. Y. 263; *Jones v. Bacon*, 145 N. Y. 446.

Q. A purchased goods from B, who relied upon an oral promise of C that if A did not pay for the goods, C would pay for them out of money in his hands belonging to A. A does not pay for the goods, and B looks to C for payment. Prior to this, C had given back the money belonging to A. What are the rights of the parties?

A. B can recover from C, as the promise here is not within the Statute of Frauds. "When a debtor puts a fund into the hands of the promisor, either by absolute transfer, or upon a trust, to pay the debts, the promise of the latter to pay the same is not within the Statute of Frauds. The party making

the promise holds the funds of the debtor for the purpose of paying his debts, and as between him and the debtor, it is his duty to pay it, in substance, he promises to pay his own debt, and not that of another." *Belknap v. Bender*, 75 N. Y. 451.

(NOTE.) The fact that the debtor has placed property in the hands of another to enable him to raise the means of paying the debt, or to indemnify him if he should choose to pay it out of his own means, does not take a verbal promise by him to the creditor, to pay the debt, out of the Statute of Frauds. The distinction must be drawn between the giving of property and the giving of money to another; a promise to pay before the property given has been converted into money, is within the Statute of Frauds. *Mallory v. Gillett*, 21 N. Y. 412; *Ackley v. Parmenter*, 98 N. Y. 425; *White v. Rintoul*, 108 N. Y. 222; *Mechanics' Bank v. Stettheimer*, 116 App. Div. 198.

Q. A sells B a horse for \$100, taking at the time a note of C for the amount, which B orally agreed to pay if C did not. The note was not paid by C. B is sued on the oral promise, and sets up the Statute of Frauds as a defense. Is the defense good?

A. The promise was an original undertaking. There was a new and distinct consideration, independent of the debt of the maker, and one moving between the parties to the new promise. In such cases, where the party undertakes for his own benefit, and upon a full consideration received by himself, the promise is not within the statute. *Johnson v. Gilbert*, 4 Hill, 178. "In mere form, it was certainly a collateral undertaking, because it was a promise that another person should perform his obligation, but looking at the substance of the transaction, we see that the defendant paid in this manner a part of the price of a horse sold to himself. In a sense merely formal, he agreed to answer for the debt of C. In reality, he undertook to pay his own vendor so much of the price of a chattel, unless a third person should make payment for him, and thereby discharge him." *Selden, J., in Cardell v. McNeil*, 21 N. Y. 336; *Bruce v. Burr*, 67 N. Y. 237; *Milks v. Rich*, 80 N. Y. 269.

CHAPTER XVII

Torts

Q. A assaults B and is arrested and indicted for the same. B then brings an action against A to recover damages for the assault. A defends on the ground that the civil action is merged in the criminal prosecution. Is A's defense good?

A. A's defense is not good. Section 1899 of the Code of Civ. Pro. provides as follows: "Where the violation of a right admits of a civil and also of a criminal prosecution, the one is not merged in the other." *Newton v. Porter*, 5 Lansing, 416; *People v. Snyder*, 90 App. Div. 423.

Q. A receives personal injuries causing his death from the negligence of B's servant. The personal representatives of A bring action against B to recover damages. After the summons had been served and before the trial, B dies. The representatives of A then make a motion to have B's representatives substituted as defendants in place of B. What should be the decision of the court? State your reasons.

A. The court should deny the motion, as the cause of action does not survive the death of the wrongdoer. A cause of action for negligence resulting in death, given by statute to the representatives of the decedent, is abated by the death of the wrongdoer. The action cannot be maintained against the representatives of the wrongdoer. *Heggerich v. Keddie*, 99 N. Y. 258. See sec. 120, Decedent Estate Law (Consolidated Laws, chap. 13, Laws of 1909, chap. 18).

(NOTE.) "A cause of action for fraud and deceit survives the death of the defendant and may be continued against his executors. The test as to whether an action survives the death of a party is whether or not the injury complained of was to pecuniary interests. It is immaterial whether or not

the wrongdoer profited by the wrong." *Meyer v. Ertheiler*, 144 App. Div. 158; *17th Ward Bank v. Webster*, 67 App. Div. 228; *Keeler v. Dunham*, 114 App. Div. 94; *Haight v. Hoyt*, 19 N. Y. 465.

Q. A, B and C were sued by D for jointly assaulting him. After issue was joined and before trial, A paid D \$500 in satisfaction of his wrongful act, taking back a release and discontinuance of the action as against himself, and which release contained the following: "the execution of this instrument shall not affect any right or cause of action of the party of the second part against any person not named therein." At the trial, these facts being proven, counsel for B and C moved to dismiss the action against them. The motion was denied and the case went to the jury which gave a verdict against B and C. They appeal from the judgment. What should be the decision on appeal? State your reasons.

A. The judgment should be affirmed. While it is true that a release, under seal of a claim given to one joint tortfeasor operates as a release of all on a theory that a party is entitled to but one satisfaction for the injury sustained by him (*Barrett v. Third Av. R. R. Co.*, 45 N. Y. 628, 635 and cases there cited), yet where the release contains an express reservation of the right to sue the other tortfeasors, it is not a release, but in effect is a covenant not to sue the person released, and a covenant not to sue does not release a joint tortfeasor. The release must be construed according to the clear intentions of the parties, and where it contains a reservation the other tortfeasors are not discharged. *Kirby v. Taylor*, 6 Johns. Ch. 250; *Irvin v. Milbank*, 56 N. Y. 635. "Nor will the defendants be relieved from liability upon the ground that the so-called release was a settlement of the entire claim, and that its effect was to discharge them upon the theory that all the defendants were joint tortfeasors, since assuming them to be such, the instrument containing an express reservation of the right to sue any person not named therein, is in effect a covenant not to sue, and a covenant not to sue does not release joint tortfeasors." *Gilbert v. Finch*, 173 N. Y. 455. "One who has been injured by the joint wrong of several parties may recover his damages

against either or all; but although there may be several suits and recoveries, there can be but one satisfaction. Where a release contains no reservation, it operates to discharge all the joint tort feorsors; but where the instrument expressly reserves the right to pursue the others, it is not technically a release, but a covenant not to sue and they are not discharged." *Walsh v. R. R.*, 204 N. Y. 58.

Q. A brings an action against B, setting forth in his complaint all the necessary allegations constituting his liability for personal injuries for negligence to C, and then an allegation of the assignment of that cause of action by C to A, the plaintiff. B demurs to A's complaint on the ground that it does not state facts sufficient to constitute a cause of action. Judgment for whom and why?

A. Judgment for B, as the claim was not assignable. Section 41 of the Personal Property Law (Laws 1909, chap. 45) provides in part as follows: "Any claim or demand can be transferred except in one of the following cases: 1. Where it is to recover damages for a personal injury, or for a breach of promise to marry." *Dauids v. B. H. R. Co.*, 104 App. Div. 23, aff'd in 182 N. Y. 526.

Q. A boy in the employ of A quarrelled with B on the street. B picked up a club and chased the boy who took refuge in A's store. In trying to save himself, the boy threw a valuable clock from the counter, destroying it. Has A a cause of action against B for the value of the clock? State your reasons.

A. Yes, as the act of B was the proximate cause of the destruction of the clock. "One who does an illegal or mischievous act, which is likely to prove injurious to others, is answerable for the consequences which may directly and naturally result from his conduct, though he did not intend to do the particular injury which followed." *Vandenburg v. Truax*, 4 Denio, 464; *Dickson v. McCoy*, 39 N. Y. 400.

Q. A was driving along the street, when a spark from an

elevated train fell upon his horse causing it to run away. A, being unable to control the horse, turned it against the curbstone, hoping to check it in that way. The wagon passed over the curb, A being thrown out and hurt, and B, who was standing on the walk, was knocked down, and severely injured. What are the rights of the parties?

A. Both A and B have a right of action against the Railroad Co., as the falling of the spark was the proximate cause of their injuries. "The true rule is, that what is the proximate cause of an injury is ordinarily a question for the jury. It is not a question of science or legal knowledge. It is to be determined as a fact, in view of the circumstances attending it. The primary cause may be the proximate cause of a disaster though it may operate through successive instruments, as an article at the end of a chain may be moved by a force applied at the other end, that force being the proximate cause of the movement, or as in the oft-cited case of the squib thrown in the market place. The question always is, was there an unbroken connection between the wrongful act and the injury, a continuous operation? Did the facts constitute a continuous succession of events, so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury?" *Lowry v. Manhattan El. Ry. Co.*, 99 N. Y. 158; *Countryman v. R. R.*, 166 N. Y. 201; *Wood v. R. R.*, 179 N. Y. 557.

Q. A, an infant, hired a horse from B. The infant drove the animal with such violence and otherwise cruelly treated it that it died in consequence thereof. The owner brings action against the infant. Can the action be maintained? If so, upon what theory? If not, why not?

A. Yes, the infant is liable in tort. Where an infant takes a horse on hire, and willfully and intentionally injures the animal by driving him with such violence that he dies, this amounts to an election on the part of the infant to disaffirm the contract of hiring, and an action in tort lies against him. While an in-

fant is not liable on contract, he is nevertheless liable for his torts. It is essential to hold an infant in a case like this to show that the injury to the horse was willful and intentional. A mere lack of moderation in driving and a failure to observe due care, where there is no willful and intentional injury, will not suffice to render an infant liable. A bare neglect to protect the animal from injury, and to return it at the time agreed upon is not sufficient. The infant cannot be held liable if the injury complained of occurred in the act of driving the animal through his unskillfulness and want of knowledge, discretion and judgment. *Campbell v. Stakes*, 2 Wend. 137; *Munger v. Hess*, 28 Barb. 75; *Moore v. Eastman*, 1 Hun, 578; *Young v. Muhling*, 48 App. Div. 617.

Q. In an action for conversion of personal property, the defendant sets up the defense of insanity. Can he succeed? State whether or not insanity is a defense to an action in tort.

A. The defendant cannot plead as a defense to an action for a tort, as the conversion of personal property, his insanity. "The general rule is that an insane person is just as responsible for his torts as a sane person, and the rule applies to all torts; except perhaps those in which malice, and, therefore, intention, actual or imputed, is a necessary ingredient, like slander, libel and malicious prosecution. In all other torts intention is not an ingredient, and the actor is responsible, although he acted with a good and even laudable purpose, without any malice. The law looks to the person damaged by another and seeks to make him whole, without reference to the purpose or condition, mental or physical, of the person causing the damage. The liability of a lunatic for his torts, in the opinion of the judges, has been placed upon several grounds. The rule has been invoked that where one of two innocent persons must bear a loss, he must bear it whose act has caused it. It is said that public policy requires the enforcement of the liability, that the relatives of a lunatic may be under inducement to restrain him, and that tort feorsors may not simulate or pretend insanity to defend their wrongful acts causing damages to others. The

lunatic must bear the loss occasioned by his torts, as he bears his other misfortunes, and the burden of such loss may not be put upon others." Earl, J., in *Williams v. Hays*, 143 N. Y. 442.

Q. A beats his wife, severely injuring her. She brings action against him to recover \$1,000 damages for the assault. The husband demurs. Judgment for whom and why?

A. Judgment for the husband. A wife cannot maintain an action against her husband to recover damages for an assault and battery which he has committed upon her. The Domestic Relations Law does not give her this right. *Abbe v. Abbe*, 22 App. Div. 483.

Q. A corporation is sued for malicious prosecution by A. The corporation demurs. Judgment for whom and why?

A. Judgment for A. A corporation is liable for malicious prosecution. A corporation is liable for its wrongful acts to almost the same extent as a natural person. *Morton v. Ins. Co.*, 34 Hun, 366, aff'd in 103 N. Y. 645; *Willord v. Holmes*, 142 N. Y. 492; *Scott v. Dennett Co.*, 51 App. Div. 326.

(NOTE.) The decision of *Eichner v. Bowery Bank*, 24 App. Div. 63, is called attention to. It was there held that a corporation is not liable for a slander committed by its agents on the ground stated that "a corporation itself could not talk." Slander is a voluntary tortious act of the speaker and therefore the agents alone are liable. This is probably the only case of tort in which a corporation has been held not liable. See *Townshend on Slander and Libel*, sec. 265, and *Odgers on Libel and Slander*, page 368.

Q. A municipal corporation, acting under and pursuant to the provisions of its charter, excavated in and upon one of its public streets in order to properly grade the same. In so doing, it dug away a part of a natural bank extending into the highway, which supported A's land, by reason of which it lost its support and fell with certain outhouses, shrubbery and fences into the excavation in the highway, to A's damage in the sum of \$10,000. There was no negligence or want of care in the execution of the work. The question arises as to the liability of the corporation. What do you say? Give your reasons.

A. The corporation is not liable. "Municipal corporations engaged in the performance of public works authorized by law, are not liable for damages occasioned thereby to others, where private property is not directly encroached upon, unless such damages are caused by misconduct, negligence or unskillfulness." *Atwater v. Trustees*, 124 N. Y. 602; *Springfield Ins. Co. v. Village of Keeseville*, 148 N. Y. 46; *Chase-Hibbard Co. v. City of Elmira*, 207 N. Y. 460.

Q. The X Co., the owner of certain premises in the City of New York, by reason of its heavy shipping, has broken several holes on the sidewalk in front of the same. A, a pedestrian, without negligence on his part, was injured by falling into one of the holes on the sidewalk. He brings suit against the X Co., who defend on the ground that the city is liable. Is this defense good?

A. No. A can recover from the X Co. as the defects in the sidewalk were caused by the company. In *Mullins v. Siegel Co.*, 183 N. Y. 109, the court said: "The principles of law applicable to the obligation of abutting owners on city streets to keep the sidewalk in a safe condition for pedestrians are well settled. The abutting owner is not bound to keep the sidewalk in repair, unless by virtue of the requirements of the statute, and is not responsible to travelers for defects therein not caused by himself." See also *English v. Kwint*, 140 App. Div. 509.

Q. A, without authority from the municipality, piles bricks in the street. By reason of not keeping a light at the place during the night, B, who was driving on the highway at night, was injured without fault or negligence on his part. He brings an action against the municipality. What additional facts, if any, must be shown to entitle him to recover?

A. He must show that the city had either actual or constructive notice. "It is the duty of a municipal corporation to keep its streets in a safe condition for public travel, and it is bound to exercise reasonable diligence to accomplish that end; that is so as well where an obstruction rendering travel unsafe is

caused by a third person, as where it is the act of the corporation. Where, therefore, public or private improvements are being made in a city street causing an obstruction, it is the duty of the city to guard them so as to protect travelers on the street from receiving injuries therefrom. The municipality is not absolved from liability by the fact that the obstruction was caused by a contractor, who, by his contract, is bound to properly guard it or place warning lights. Plaintiff must show that it was left unguarded by the defendant after notice of its existence." *Pettengill v. City of Yonkers*, 116 N. Y. 558; *Deming v. Ry. Co.*, 169 N. Y. 1; *Scott v. Village of Saratoga*, 199 N. Y. 184.

Q. A is run over by an ambulance belonging to the Department of Charities of the City of New York, and sustains injuries which cause his death. His representatives bring suit against the city. Can the action be maintained? Give your reasons.

A. No. The city is not liable. "Where by the act of the legislature, a municipal corporation is required to elect or appoint an officer to perform a public duty laid not upon it, but upon the officer in which it has no private interest, and from which it derives no special benefit, such officer is not a servant or agent of the municipality, and for his negligence or want of skill in the performance of his duty or for that of a servant whom he employs, it is not liable; and this although the officer or servant has in charge, and the negligence is in use of the corporate property. The duties imposed upon the commissioner of charity for the City of New York by statute are public in their character, and from their performance no special corporate benefit is acquired. Such officers, therefore, or their servants are not agents of the city for whose negligent acts it is liable." *Maxmillian v. Mayor*, 62 N. Y. 160; *Matter of Reynolds*, 202 N. Y. 441.

(NOTE.) In *Missano v. Mayor*, 160 N. Y. 123, it was held that the City of New York is liable for the negligent acts of its employees in its department of street cleaning, on the ground that the city acts in the discharge of a spe-

cial power granted to it by the legislature in the exercise of which it is a legal individual, and that the duty of removing ashes, garbage, etc., is a private and not a governmental function. See also *Quill v. Mayor*, 36 App. Div. 476; *Ryan v. City of N. Y.*, 177 N. Y. 271; *McMullen v. City of Middletown*, 187 N. Y. 45.

Q. A is injured in an accident and is taken to a charity hospital for treatment. Through the negligence of the physician in charge, gangrene sets in on the wounds, and as a consequence thereof A dies. His representatives bring action against the hospital. Can they recover?

A. No. "A public hospital or asylum is liable for the tort or negligence of an officer or servant only when such corporation has been guilty of negligence in selecting such officer or servant. When the corporation has used due care in selecting the servant or officer, it is not liable for his subsequent act, unless prior to the occurrence of such act, knowledge of the unfitness and incapacity of such officer or servant was communicated to and fully brought home to the corporation." *Joel v. Hospital*, 89 Hun, 23; *Collins v. N. Y. P. G. Med. School*, 59 App. Div. 65; *Hordem v. Salvation Army*, 199 N. Y. 237.

Q. A enters a certain charity hospital and agrees to pay \$25 a week for treatment, the hospital also agreeing to furnish a trained nurse. Through the negligence of the nurse furnished, A's illness becomes aggravated, and in consequence thereof she is compelled to undergo an operation involving the expenditure of a large sum of money. A brings action against the hospital. Can the action be maintained? If so, upon what theory? If not, why not?

A. The action can be maintained on the theory of a breach of contract. It was so held in *Ward v. St. Vincent Hospital*, 39 App. Div. 624, where it was said that: "A contract made by a charity hospital to receive a patient into the hospital and to furnish her with a skillful trained nurse for a certain sum per week, is not beyond its powers. The patient may, in an action against the hospital to recover damages for breach of such con-

tract, obtain indemnity for injuries sustained by the negligence of its servants."

Q. A, the owner of a building, makes an agreement with B, a contractor, to repair the roof of his house for a certain sum. To do this it is necessary to erect a scaffold over the street. A workman of B carelessly lets fall a hammer and injures C who is passing on the street. What are the rights of C?

A. C can bring an action against B, but has no right of action against A. "Where a person is employed to perform a certain kind of work in the nature of repairs or improvement to a building by the owner thereof which requires the exercise of skill and judgment as a mechanic, the execution of which is left entirely to his discretion, with no restriction as to its exercise and no limitation as to the authority conferred in respect to the same, such person does not occupy the relation of a servant under the master, but he is an independent contractor, and the owner is not liable for his acts or the acts of his workmen who are negligent and the cause of injury to another." *Hexamer v. Webb*, 101 N. Y. 377. "The rule that where the relation of master and servant does not exist, but injury results from negligence in the performance of work by a contractor, the party with whom he contracts is not responsible for his negligence or that of his servants, is well established by the authorities in this state." *Kelly v. Mayor, etc.*, 11 N. Y. 432; *King v. R. R. Co.*, 66 N. Y. 181; *Herrington v. Village of Lansingburgh*, 110 N. Y. 145; *Roemer v. Striker*, 142 N. Y. 134.

(NOTE.) "There are certain exceptions to the independent contractor rule; as 1. Where the employer personally interferes with the work, and the act performed by him occasioned the injury; 2. Where the thing contracted to be done is unlawful; 3. Where the acts performed create a public nuisance; and 4. Where an employer is bound to do a thing efficiently by statute, and an injury results from its inefficiency." *Berg v. Parsons*, 156 N. Y. 109. See also *Engel v. Eureka Club*, 137 N. Y. 100; *Burke v. Ireland*, 166 N. Y. 305; *Parson v. Johnson*, 208 N. Y. 337.

Q. B is a contractor building a house for A. B is short of help, and borrows A's hired man and sets him at work on the

building. While at work he negligently lets fall a beam on C, a stranger, who is free from contributory negligence, injuring him. Who is liable, if anybody, to C? Give the general rule.

A. B is liable to C, because the hired man was the servant of B at the time of the accident. "The doctrine of respondeat superior applies only where the relation of master and servant is shown to exist between the wrongdoer and the person sought to be charged for the result of the wrong at the time and in respect to the very transaction out of which the injury arose. The fact that the party to whose wrongful or negligent act an injury may be traced, was at the time in the general employ and pay of another person, does not necessarily make the latter responsible for his acts. The master is the person in whose business he is engaged at the time, and who has the right to control and direct his conduct. Servants who are employed and paid by one person may, nevertheless, be ad hoc the servants of another in a particular transaction, and that too, when their general employer is interested in the work. When one person lends his servant to another for a particular employment, the servant, for anything done in that employment, must be dealt with as the servant of the man to whom he is lent, although he remains the general servant of the man who lent him." *Higgins v. W. U. Tel. Co.*, 156 N. Y. 75; *McInerney v. D. & H. C. Co.*, 151 N. Y. 411; *Sexton v. R. R.*, 189 N. Y. 518.

Q. A instructs his coachman to shovel snow off the roof and to be careful not to throw any of it on the passers-by in the street. The coachman secures the assistance of a friend of his, and leaves him for a few minutes. During the absence of the coachman, the friend injures a passer-by on the street below by throwing a quantity of snow and ice upon him from the roof. Has the passer-by an action against anyone, and if so, against whom?

A. He has an action against A. "One who directs his servant to remove snow and ice from the roof of his house, is responsible for an injury received by a passenger in the street

from such snow and ice, whether the negligence was that of a servant or a stranger whom he employed or who volunteered to assist him." *Althorf v. Wolf*, 22 N. Y. 355; *Kilroy v. D. & H. C. Co.*, 121 N. Y. 22; *Spencer v. State of N. Y.*, 110 App. Div. 587; *Ellefson v. Singer*, 132 App. Div. 90.

(NOTE.) The rule is well stated in *Gleason v. Amsdell*, 9 Daly, 393, as follows: "Where an injury arises through the negligence of a servant, acting within the scope of his authority, the act of the servant is deemed the act of the master and he is answerable for it. He is answerable for the negligence of one whom the servant employs by his authority, to aid the servant in the employment of the master's business; and it is not necessary in such a case, to show that such authority was expressly given; but it may be implied from the nature of the business, the course of trade and the circumstance of the particular case." This was quoted with approval in *Wooding v. Thorn*, 148 App. Div. 24. Of course where the servant contrary to his master's instructions allows a third person to assist him, then the master is not responsible for the acts of such third person. *Long v. Richmond*, 68 App. Div. 466.

Q. A, who is employed by B as driver for his milk wagon during the week, went to his master's stable on Sunday and took therefrom his master's horse and carriage. While driving the same, he negligently runs over and injures C. C brings action against B. Can he recover?

A. He cannot recover from B. "A master is not liable for personal injuries sustained by a third person through the negligence of his servant, unless the relation of master and servant existed in respect to the very transaction out of which the injury arose; therefore, for an injury caused by the negligence of a servant without the authority and when not on the business of the master, the master is not liable. In determining whether a particular act is done in the course of the servant's employment it is proper first to inquire whether the servant was at the time engaged in serving his master. If the act is done while the servant is at liberty from service and pursuing his own ends exclusively, there can be no question of the master's freedom from all responsibility, even though the injury complained of could not have been committed without the facility afforded to the servant by his relation to his master."

Fish v. Coolidge, 47 App. Div. 159; *Casey v. D. F. Machine Co.*, 138 App. Div. 396; *Freibauer v. Brady*, 143 App. Div. 220; *Wyllie v. Palmer*, 137 N. Y. 248.

(NOTE.) "A master is liable for the acts of his servant within the general scope of his employment, while engaged in the master's business, and done with a view to the furtherance of the master's business and interest, whether such act be done negligently, wantonly or even willfully." *Levy v. Ely*, 48 App. Div. 554.

Q. A driver is returning with his master's load from a warehouse. On the way he meets a clerk of his master, who asks him to go up the side street and get a personal package for him (the clerk); he does so and while on the side street injures C. What are the rights of the parties? State the general rule.

A. The master is not liable. "The departure of the driver from the ordinary route to the stable for the purpose of doing a favor for a coservant, as stated in the evidence, was clearly an unauthorized deviation and not within the scope of his duty. He cannot be said, within the authorities, to have been acting in the service of the defendant while engaged in going for the trunk and valise for his coservant and taking them to their destination. The act was not only without authority, but also without the knowledge or consent of the defendant or of any superior officer of the driver. It is well settled that a master is not liable for injuries sustained by the negligence of his servant while engaged in an unauthorized act beyond the scope and duty of his employment, for his own or another's purposes, although the servant is using the implements or property of the master in such an unauthorized act." *Cavanagh v. Dinsmore*, 12 Hun, 465; *Cosgrove v. Ogden*, 49 N. Y. 255; *Quinn v. Power*, 87 N. Y. 535; *Smith v. R. R.*, 78 Hun, 524.

Q. A and B were employed by the X Ice Company to drive their wagon and supply their customers with ice. On a certain day they were sent with a load of ice to C who had ordered the same, with instructions to proceed directly to his (C's) place of business. On the way they stopped at D's store to sell him a cake of ice for their own private gain. D's store was about six

blocks out of the direct route to C's place. After selling the cake of ice to D, they immediately proceeded to C's place. While on the way they negligently ran over and injured M. M brings action against the company. Can he recover? State your reasons.

A. Yes, as the accident did not occur during the deviation. "It is the rule, no doubt, that a master is not necessarily relieved from responsibility for an injury resulting from the negligence of a servant, simply because the servant is at the time acting in disobedience to the master's orders. The question in every case is whether the act he was doing was one in prosecution of his master's business, not whether it was done in accordance with his instructions. If the act was one, which, continued until the termination, would have resulted in carrying out the object for which the servant had been employed, the master would be liable for whatever negligence might take place during its performance, although the servant in doing it was not obeying the instructions of the master, or although he had deviated from the route prescribed by the master for the purpose of doing some act of his own, yet with the intention at the same time of pursuing his master's business. Within the rule above cited the liability still continues, unless the deviation is made not in the prosecution of the master's business, but for some different and other purpose. That the fact that the defendant's employees had, for purposes of their own, deviated from the direct route in delivering the ice, did not of itself relieve the master from liability, although such liability might be suspended during the time the employee prosecuted their own affairs, as a liability would attach again immediately after the driver in prosecution of the master's business resumed his course to the station." *Geraty v. Nat. Ice Co.*, 16 App. Div. 174, *aff'd* in 160 N. Y. 658; *Riegler v. Tribune Ass'n.*, 40 App. Div. 327.

Q. A and B being engaged in an angry altercation, B stepped into his office and brought out a gun which he aimed at A in an excited and threatening manner, A being three or four yards

distant. B snapped the gun twice at A. A believed that the gun was loaded. The gun was in fact not loaded and B knew this. Has A a cause of action against B?

A. Yes. This is an assault, and there need be no injury to constitute an assault. "An assault is an attempt or offer to beat another without touching him. The least touching of another's person, willfully or in anger, is a battery." 3 Bl. Comm. 120. "An assault is an attempt with force or violence to do a corporeal injury to another, and may consist of any act tending to such corporeal injury, accompanied with such circumstances as denote at the time an intention coupled with the present ability of using actual violence against the person." *Hays v. People*, 1 Hill, 351; *Bullock v. Babcock*, 3 Wend. 391; *Johnson v. McConnell*, 15 Hun, 295; *People v. Moore*, 50 Hun, 356.

Q. A strikes B with his fist. B immediately picks up a club and beats A with it, severely injuring him. B brings action against A to recover damages for assault and battery. Can he recover?

A. No. "A party first attacked is not entitled to maintain an action for assault and battery against the other party, if he, the first party, exceeds the bounds of self-defense. Care must be taken that the resistance does not exceed mere defense, so as to become vindictive, for then the defender will himself become the aggressor." *Scribner v. Beach*, 4 Denio, 450. The force used must not exceed the necessity of the case. *Elliot v. Brown*, 2 Wend. 499; *Gates v. Lounsbury*, 20 Johns. 427; *Evers v. People*, 3 Hun, 716, *aff'd in 63 N. Y.* 625.

Q. A was bookkeeper and cashier for B. He collected certain money from a customer of B's, and refused to give it up when requested to do so by B, claiming that the sum was due to him (A). B then attempted to take the money from A by force, striking and knocking him down, thereby injuring him severely. A brings action against B. Judgment for whom and why?

A. Judgment for A. "It is elementary that one may justify an assault and battery in self-defense or in defense of his possession of real or personal property. But the general rule is, that a right of property merely, not joined with possession, would not justify the owner in assaulting to regain possession, though possession is wrongfully withheld." *Bliss v. Johnson*, 73 N. Y. 529. "The law does not permit parties to take the settlement of conflicting claims into their own hands. It gives the right of defense, but not of redress. The circumstances may be aggravating; the remedy of law may seem to be inadequate; but still the injured party cannot be arbiter of his own claim. If one has intrusted his property to another who afterwards honestly, though erroneously, claims it as his own, the owner has no right to retake it by personal force." *Gyre v. Culver*, 47 Barb. 592; *Parson v. Brown*, 15 Barb. 590; *Filkins v. People*, 69 N. Y. 106.

(NOTE.) The owner of real property cannot, by resorting to force, obtain its possession from one wrongfully withholding the same from him. Resorting to force, under such circumstances, is unlawful and the one in possession may resist with force. *Bristor v. Burr*, 120 N. Y. 427; *Brendlin v. Beers*, 144 App. Div. 405.

Q. A sues B for false imprisonment. At the trial, the judge charges the jury that the plaintiff in order to succeed must establish the want of probable cause and malice, in addition to the unlawful restraint. Is the charge sustainable on appeal?

A. No. "Even malicious motives and the absence of probable cause do not give a party arrested an action for false imprisonment. They may aggravate his damages, but they have nothing whatever to do with the cause of action." *Earl, J.*, in *Marks v. Townsend*, 97 N. Y. 590. All that is necessary to maintain an action for false imprisonment is unlawful restraint of one's person. *Burns v. Erben*, 40 N. Y. 466; *Palmeri v. Ry. Co.*, 133 N. Y. 261.

(NOTE.) "The distinction between false imprisonment and malicious prosecution is fundamental. They are made up of different elements enforced by different forms of actions, are governed by different rules of pleading,

evidence and damages, and are subject to different defenses. False imprisonment has been well defined to be a trespass committed by one man against the person of another by unlawfully arresting him and detaining him without legal authority. (Addison on Torts, 3d Edition, page 552.) Where the detention is illegal the action will lie, without regard to the innocence of the defendant in his intentions. (*Snead v. Bonnbil*, 166 N. Y. 325.) If the imprisonment is lawful it does not become unlawful because done with malicious intent; if the conduct be unlawful, neither good faith nor provocation nor ignorance of the law is a defense to the person committing the wrong, in a civil as distinguished from a criminal proceeding. In an action for false imprisonment the essentials are: First, that plaintiff was arrested and detained by defendant without process; second, that plaintiff was not guilty of the offense for which he was arrested." *Clarke, J., in Johnston v. Bruckheimer*, 133 App. Div. 651. See also *Grinnell v. Weston*, 95 App. Div. 454.

Q. A has certain moneys in his house; he misses the same, and suspecting B, his servant, of having taken the moneys, he has him (B) arrested and indicted for larceny. The servant alone had access to the room where the moneys were kept. On the trial it appearing that the moneys were found, having been misplaced, B was acquitted. He sues A for malicious prosecution. Can he recover?

A. No, for A had reasonable cause for instituting the prosecution. In order to maintain the action for malicious prosecution, three things are necessary: 1. That the prosecution is at an end and was determined in favor of the plaintiff. 2. Want of probable cause. 3. Malice. "A real belief and reasonable grounds for it, must concur to afford a justification. Good faith alone is not sufficient." *Farnam v. Feeley*, 56 N. Y. 451.

(NOTE.) "To authorize a recovery in an action for malicious prosecution in bringing a civil action wherein the defendant was unsuccessful, clear and satisfactory proof of all the fundamental facts constituting plaintiff's case must be given. Costs awarded to a successful defendant in a civil action are the indemnity which the law gives them for a groundless prosecution, and actions for malicious prosecution based thereon are not to be encouraged." *Ferguson v. Arnow*, 142 N. Y. 580.

Q. A and B are husband and wife. C, the father of A, induced him to leave his wife; A furnishes her with necessities,

but will not go back to her; she is thereby deprived of his society. What action, if any, can B bring?

A. B can sue the father for the alienation of her husband's affections. "A wife may maintain an action, under sec. 450 of the Code of Civ. Pro. in her own name and for her own benefit, without joining her husband as a party, against one who has enticed him from her, alienated his affection, and deprived her of his society." *Bennett v. Bennett*, 116 N. Y. 584. See also *Servis v. Servis*, 172 N. Y. 444.

Q. A persuades his daughter to leave her husband and live apart from him, on the ground that he believes it is not proper for her to live with him, on account of statements which he has heard concerning the husband's moral character, which statements A hears from what he considers a reliable source, and honestly believes them to be true. There was in fact no foundation for the charges, and they were utterly false, but A acted in good faith. Can the husband maintain an action against the father for damages?

A. No, as the father acted in good faith. "It is well settled that a husband may maintain an action for enticing away his wife, or inducing her to live apart from him; and this, whether the wrongdoer be the father of the wife or any other person. When the conduct of the husband is such as to endanger the personal safety of his wife, or is immoral and indecent, as to render him grossly unfit for her society, so much so that she would be justified in abandoning him, her parents have the right to receive her into their house, and advise her to come there and remain, and they will not be answerable in damages to the husband. And the same doctrine is applicable to a case where the advice is given by a parent, in the honest belief, justified by information received by him that such circumstances exist, although the information proves subsequently unfounded. It is sufficient for his protection, that he was warranted in such belief and acted from pure motives." *Bennett v. Smith*, 21 Barb. 439; *Smith v. Lyke*, 13 Hun, 204; *Hollister v. Valentine*, 69 App. Div. 588.

Q. A seduces B, a minor daughter of C. C brings action against him to recover damages. At the trial, the father does not show any actual loss of the daughter's services. B moves to dismiss. What should be the ruling of the court?

A. Motion should be denied. An action may be maintained by a father for seduction without proving any actual loss of services; it is enough that the daughter be a minor residing with her father, or that he has the right to command her services. Although the action for seduction is founded upon the legal fiction of the loss of services, the damages recoverable always embrace injuries to the family reputation, etc. *Hewitt v. Prime*, 21 Wend. 148; *Badgley v. Decker*, 44 Barb. 588; *Ingerson v. Miller*, 47 Barb. 47; *Lawyer v. Fletcher*, 130 N. Y. 239.

(NOTE.) The father's right of action continues after the daughter has become of age, if the relation of master and servant still exists between them. If the daughter submits after her majority to her parents' exercising authority over her, although not under an actual engagement to serve them, the action is maintainable by the parent. The slightest acts of service have been held sufficient to constitute the relation of master and servant. The rule as to damages is the same, whether the daughter be a minor or of full age, and the plaintiff is not limited in his recovery to mere compensatory damages, but may recover exemplary damages, where he is so connected with her, as to be capable of receiving injury through her dishonor. *Lipe v. Eisenlord*, 32 N. Y. 229.

Q. A, a young man, promises to marry B, a girl of nineteen years of age, who resides with her parents. Thereafter he seduces her. What action or actions, if any, can be maintained against A?

A. The parents may maintain an action for the seduction. Seduction under promise of marriage is also a crime by sec. 2175 of the Penal Law. While the seduced party cannot maintain an action for her own seduction, since she has consented to the act, yet she may sue for breach of promise of marriage, in which action she practically recovers damages for the seduction.

Q. A, a physician, brings suit against B for slander, who said of him: "He is a blockhead! He is not fit to treat a cow!" The physician introduced no testimony of any kind as to actual damages. The plaintiff asked to have submitted to the jury the question of punitive damages. Should the court grant his request?

A. Yes. The words spoken are actionable *per se* without proof of actual damages, as they impute a general want of professional skill. The cases actionable *per se* are generally said to be the following: 1. Where the words spoken impute a criminal offense. 2. Where they impute a disgraceful disease, which would cause the party to be excluded from society. 3. Where they convey a charge of unfitness, dishonesty, or incompetence in an office, profession, trade or calling. *White v. Carroll*, 42 N. Y. 162; *Cruikshank v. Gordon*, 118 N. Y. 178; *Krug v. Pitass*, 162 N. Y. 154. It is also provided by sec. 1906 of the Code of Civ. Pro. that an imputation of unchastity to a woman is actionable without proof of special damage. In cases actionable *per se*, plaintiff is usually entitled to recover punitive damages. "When the falseness of an article which is actionable *per se* is proved, this is sufficient, as a general rule, to warrant the jury in giving exemplary or punitive damages. Proof that there was no actual malice, while not conclusive, is to be considered by the jury with the other evidence, in the determination of the question whether exemplary damages should be given or withheld." *Bergman v. Jones*, 94 N. Y. 51.

Q. A says of B who is a plumber, that he knows nothing of his trade. B brings action against A, and on the trial attempts to show that he has lost many customers by reason of this slander. He did not allege any special damage in his complaint. A objects to the admission of the evidence. What should be the ruling of the court?

A. The evidence should be excluded. Even in cases actionable *per se* special damage must be alleged in order that it

may be proven at the trial. Not alone must the special damage arising from the loss of customers be pleaded but the names of such customers must be stated. Plaintiff cannot prove that anyone not named in his complaint has stopped dealing with him, and loss of customers is an item of special damage and must be alleged in order to authorize a recovery therefor. *Herrick v. Lapham*, 10 Johns. 281; *Loftus Co. v. Bennett*, 68 App. Div. 128; *Rembt v. Roehr Rub. Co.*, 71 App. Div. 459; *Cruikshank v. Bennett*, 30 Misc. 232.

Q. A and B were out driving together and they casually met C. A. thereupon said to B: "Be careful how you deal with that man C, he is dishonest and he will do you if he can." Nothing more was said. C was a retired merchant not engaged in any business. B reported the conversation to C, who sued A for slander. On the trial C proved the above facts and rested. A thereupon moved for judgment. Judgment for whom and why?

A. A should have judgment. "The oral accusation of dishonesty is not slanderous *per se*, and no action will lie for the utterance of such a charge by word of mouth unless it relates to the plaintiff in a special character or occasions special damage. There is no allegation that the words in question were spoken of the plaintiff in reference to any occupation or business, nor is there any averment that he had any occupation or was engaged in any business. The omissions are fatal to the statement of the cause of action." *Cassaway v. Pattison*, 93 App. Div. 371, 372. "Any charge of dishonesty against an individual in connection with his business, whereby his character in such business may be injuriously affected, is actionable. If spoken of him individually, and not in connection with his office or business, these words would not be actionable." *Fowles v. Bacon*, 30 N. Y. 24. "Where an action is brought for words not actionable in themselves, spoken of a person in a particular calling, profession, or employment, it must appear that he followed such profession or employment when the words were spoken." *Forward v.*

Adams, 7 Wend. 208. See also Synott v. Pearson, 138 App. Div. 306.

Q. A, the publisher of a newspaper, publishes of B, a clergyman, that he was seen in certain concert halls of bad reputation. He brings action against A, but does not allege any special damage. A sets up truth as a defense. What are the rights of the parties?

A. The clergyman can maintain the action if the words are false, for writings are actionable without proof of special damage, when they tend to hold the party up to contempt, disgrace or ridicule. Truth, however, in civil actions is a good defense, even though there is malice in the charge. For it has been held that the motives with which the publication was made are immaterial as long as the charge was true. *Root v. King*, 7 Cowen, 613; *George v. Jennings*, 4 Hun, 66. When truth is relied upon as a defense it must be pleaded. *Roeber v. Staats Zeitung*, 1 App. Div. 427. In criminal cases truth alone is not a good defense, but the publication is only justified when the matter charged as libelous is true, and was published with good motives and for justifiable ends. "The publication is also excused by the Penal Law when it is honestly made, in the belief of its truth and upon reasonable grounds for this belief, and consists of fair comments upon the conduct of a person in respect of public affairs, or upon a thing which the proprietor thereof offers or explains to the public." Penal Law, sec. 1342. *People v. Sherlock*, 166 N. Y. 189.

Q. A corporation engaged in the dry goods business was charged by a certain newspaper with being insolvent. The corporation brings action against the paper without alleging special damage. Can the action be maintained?

A. Yes. The imputation of insolvency is actionable *per se*, therefore the corporation can maintain the action without showing special damage. Words which are calculated to impair the credit or in any way to affect the standing of a

person or corporation in relation to his or its trade or business, are actionable *per se*, and an action for libel may be maintained thereon without alleging special damage. *Mott v. Comstock*, 7 Cowen, 654; *Bank v. Thompson*, 23 How. Pr. 253; *Union Assoc. Press v. Heath*, 49 App. Div. 247. "A corporation like a natural person has the right to maintain an action of libel when the publication assails its management or credit and inflicts injury upon its business or property, and an averment of specific damage is not necessary when the language is of so defamatory a nature as to directly affect credit and occasion pecuniary injury." *Reporters' Assn. of America v. Sun Printing & Pub. Assn.*, 186 N. Y. 437.

Q. A mercantile agency published a statement to the effect that a judgment for \$4,000 had been rendered against A who was engaged in the manufacturing business. This statement was untrue. A brings action without alleging any special damage. Can he maintain the action?

A. No. "The words were not in themselves libelous, as an imputation against the soundness of plaintiff's financial condition. The mere recovery of a judgment does not necessarily import default in the payment of a debt. There is nothing to indicate in defendant's report that the judgment was produced by any cause prejudicial to the credit of the plaintiff. It seems, that upon an averment and proof of special damages resulting from such a false publication, an action would be sustainable." *Woodruff v. Bradstreet*, 116 N. Y. 217.

Q. The defendant, a news publishing company, on the trial of an action brought to recover damages for publishing a libelous article concerning plaintiff, sought to prove in mitigation of damages, that the plaintiff had in two other actions obtained judgments aggregating \$2,000 against other newspapers for having published the identical libel complained of in this action, and that said judgments have been paid, all of which the defendant duly pleaded. State whether or not the evidence should be admitted. Give your reasons.

A. The evidence should not be admitted. "Thus a previous judgment against the proprietor of a newspaper, even though satisfied, is no bar to an action for the same libel against the author. *A fortiori*, that heavy damages have been recovered against one newspaper, is no bar to an action against another newspaper which has published the same libel. Such previous recovery should not be even mentioned to the jury in mitigation of damages, nor should it be stated that such other actions are pending." Odgers on Libel and Slander, p. 457. "It is now too well settled to be questioned that the fact that others have published the same libel which was unknown to the defendant when the publication complained of was made, or that suits have been commenced against others for the publication of such libel, is inadmissible. The defendants in this case were liable and that some one else was also liable was immaterial. It would not properly diminish the recovery against them to show that the plaintiff had recovered or might recover damages from others who had published the same libel. Each defendant is to pay damages for the injuries which he has occasioned and not for the injury by others. Therefore this class of evidence is inadmissible. While the defendant may perhaps show in mitigation of damages that he copied the libelous paragraph from a public newspaper, and hence, believed it to be true, he may not show that other journals published the same statement simultaneously or subsequently to the publication complained of. Nor can he prove that the alleged libel appeared in another newspaper for which the plaintiff had already recovered damages. That this evidence was inadmissible seems to be well established by the decisions in this state. *Tillotson v. Cheetham*, 3 Johns. 56; *Gray v. Brooklyn Hat Co.*, 35 App. Div. 286; *Hatfield v. Lasher*, 81 N. Y. 246; *Mattice v. Wilcox*, 147 N. Y. 624." Martin, J., in *Palmer v. Matthews*, 162 N. Y. 103.

Q. A sues B for libel. B at the trial attempts to show in mitigation of damages, that A has at various times committed acts similar to the one charged in the statement. Should he be allowed to do so?

A. No. A defendant will not be allowed to show in mitigation of damages for a specific libel other and disconnected immoral acts on the part of the plaintiff, but can only attack the plaintiff's general bad character. *Corning v. Corning*, 6 N. Y. 104; *Holmes v. Jones*, 147 N. Y. 59; *Cudlip v. N. Y. Ev. Journal Pub. Co.*, 180 N. Y. 87.

(NOTE.) It is always a question for the jury as to whether or not there was malice in the publication of a libel, when punitive damages are allowed. *Crane v. Bennett*, 177 N. Y. 106.

Q. A, a lawyer, on the trial of a certain action, in summing up to the jury, denounces B as a liar and a perjurer. This is absolutely false. B brings an action against A for slander, and at the trial attempts to show that the statements were made maliciously. Can he do so, and is the action maintainable?

A. The evidence cannot be admitted and the action cannot be maintained. Statements made by counsel in addressing the jury when pertinent to the issue are absolutely privileged, and no evidence of malice is admissible. *Garr v. Selden*, 4 N. Y. 91; *Marsh v. Ellsworth*, 50 N. Y. 309; *Woodman v. Kidd*, 25 App. Div. 254.

(NOTE.) The distinction must be drawn between absolute and qualified privilege. In the former, the protection is complete, and no evidence of malice is admissible; the latter is only effectual for protection when the statements are not made maliciously; if malice is shown, the privilege fails. *Klinck v. Colby*, 46 N. Y. 427; *Hamilton v. Eno*, 81 N. Y. 124. The rule as to qualified privilege is stated in sec. 1350 of the Penal Law as follows: "A communication made to a person entitled to or interested in the communication by one who was also interested in or entitled to make it, or who stood in such a relation to the former as to afford a reasonable ground for supposing his motive innocent, is presumed not to be malicious, and is called a privileged communication."

Q. A, an intimate friend of B and her family, in good faith, tells the father and brother of B, that C, to whom B is engaged to be married, has been convicted of a felony. There is absolutely no truth in such statement. Has C any right of action? And if so, what?

A. He can maintain an action for slander. The statement not being in answer to an inquiry was not privileged. "A mere friendly acquaintance or regard does not impose a duty of communicating charges of a defamatory character concerning a third person, although they may be told to one who has a strong interest in knowing them. The duty of refraining from the utterance of slanderous words, without knowing or ascertaining their truth, far outweighs any claim of mere friendship. A communication made bona fide upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty is privileged, if made to a person having a corresponding interest or duty, although it contained criminating matter which, without this privilege, would be slanderous and actionable; and this, though the duty be not a legal one, but only a moral or social duty of imperfect obligation. . . . It is easy enough to apply the rule in cases where both parties, the one making and the other receiving the communication, are interested in it, or where the parties are related, or where it is made upon request to a party who has an interest in receiving it, or where the party making it has an interest to subserve, or where the party making it is under a legal duty to make it. But when the privilege rests simply upon the moral duty to make the communication, there has been much uncertainty in applying the rule. The difficulty is to determine what is meant by the term 'moral duty,' and whether in any given case there is such a duty." Earl, J., in *Byam v. Collins*, 111 N. Y. 143. See also *Ashcroft v. Hammond*, 197 N. Y. 494; *Hoey v. N. Y. Times Co.*, 138 App. Div. 153.

(NOTE.) As a general rule privilege in actions for libel is a matter of defense, and should be pleaded in order to be available. *Stevenson v. Ward*, 48 App. Div. 291; *Stuart v. Press Pub. Co.*, 83 App. Div. 467; *Tierney v. Ruppert*, 150 App. Div. 863.

Q. A tells B that the stock of a certain corporation is a safe and good investment, honestly believing that what he said was true. B relying on the statements buys some of the stock. It is worthless, and B loses his money. B comes to you for advice. What are his rights?

A. He has no rights against A, as the statements were merely opinions and therefore not fraudulent. The elements of an action for fraud and deceit are not here present. The elements of such an action are: 1. False representations of material facts by the defendant. 2. That defendant knew they were false or should have known so. 3. Plaintiff believed and had a right to believe that they were true. 4. That defendant intended that the statements should be acted upon. 5. That plaintiff did act upon them to his damage, or as tersely stated by Church, Ch. J., in *Arthur v. Griswold*, 55 N. Y. 400: "Representation, falsity, scienter, deception and injury." Pecuniary loss to the deceived party is absolutely essential to the maintenance of the action. Fraud and deceit alone do not warrant the recovery of damages. Deceit and injury must concur. *Taylor v. Guest*, 58 N. Y. 260; *Ettinger v. Weil*, 184 N. Y. 79; *Urtz v. R. R. Co.*, 202 N. Y. 170.

Q. A agreed to purchase of B by parol agreement a quantity of cheese, and pay him the market price therefor, if delivered within two weeks. B being made to believe by the false representations of C that A did not want the cheese sold it to C. The contract was void under the Statute of Frauds, but it would have been performed by B had it not been for C's false statement. This false statement of C was intended to and did deprive A of the benefit of his contract. Upon learning of these facts A brought suit against C for fraud and proved damages for \$500. The above facts being conceded, who should have judgment and why?

A. Judgment for A. The action is maintainable for fraud and deceit and it makes no difference that A could not enforce his agreement against B, as B would have performed and A would have had the benefit of it but for the fraud of C. *Snow v. Judson*, 38 Barb. 210; *White v. Merritt*, 7 N. Y. 352. "In order to maintain the action for fraud it was sufficient to show as here that defendant knowingly uttered a falsehood with the design to deprive the plaintiff of a benefit and to acquire it to himself." *Rice v. Manley*, 66 N. Y. 84, and so also N. Y. L. I.

Co. v. Chapman, 118 N. Y. 288, where it was said that: "It is essential to the maintenance of an action for fraud to show that damages resulted from it as the proximate cause, but it is not necessary to show that the person guilty of the fraud derived any benefit from it." See also *Benett v. Pratt*, 2 Wend. 385; *Schlenk v. Naylor*, 102 N. Y. 683.

Q. A owns a farm some distance away. B wishes to buy and goes to A and inquires. A tells him that the farm is worth \$50 per acre, but in reality it is worth only \$10 per acre. A also tells him that if he wishes he will take him out to see the farm or if he wishes he can inquire as to its value. B purchases without doing either. Can B under the circumstances maintain an action against A? State your reasons.

A. No. "Upon the question of value the purchaser must rely upon his own judgment, and it is folly to rely upon the representations of the vendor in that respect." *Ellis v. Andrews*, 56 N. Y. 83. "The rule is well stated that a naked assertion by the vendor of the property offered for sale, even though untrue of itself, and known to be such by him, unless there is a want of knowledge on the part of the vendee and the sale is made in entire reliance upon the representation, or unless some artifice is employed to prevent inquiry or the obtaining of knowledge by the vendee, will not render the vendor liable for damages." *Chrysler v. Canady*, 90 N. Y. 272.

Q. A owns a certain farm and offers to sell it to B for \$10,000, telling him that it is fully worth that amount, and that the farm then kept and would keep and maintain from its products 100 head of cattle and 20 horses. The farm is situated some ten miles distant and B is a stranger in that neighborhood. B relies entirely upon A's representations and hence does not go to see the farm before buying it. The statements of A prove to be false. What are B's rights?

A. He can sue A for the damages sustained by reason of the fraud, as the facts here show actionable deceit. "I think the general rule is that if the facts represented are not matters

peculiarly within the one party's knowledge, and the other party has the means available to him of knowing by the exercise of ordinary diligence the truth or real quality of the subject of the representation, he must make use of those means, or he will not be heard to complain that he was induced to enter into the transaction by misrepresentation. I think the particular representation made to induce the purchase of this farm, was as to a material fact, affecting the quality of a farm and its actual value for a certain purpose, and which lay peculiarly within his knowledge. It is difficult to see how the exercise of common prudence, and the use of ordinary intelligence, or of the faculty of sight would have enabled plaintiff to detect the falsity of the statement and therefore, why she was not entitled to rely absolutely upon it." Gray, J., in *Schumaker v. Mather*, 133 N. Y. 590. "The present case differs from those cases where the statements of the seller of land relate to its value, merely as such or as to its adaptation to particular modes of cultivation. Such statements express or represent but the opinion of the seller, and cannot be said to be as to matters lying peculiarly within his knowledge. However they may fail of verification, in result of working, they do not furnish evidence of fraudulent intent." *Simar v. Canaday*, 53 N. Y. 306.

Q. A sells land to B. In order to induce B to purchase, A told him that he had paid \$2,500 for the land to C, from whom he (A) had bought it. B thereupon paid \$2,500 for the land. As a matter of fact, A had only paid \$1,000 and the property was not worth more than that amount. What are B's rights?

A. B can maintain an action for fraud and deceit. A false representation made by the vendor when about to sell land to the party proposing to purchase as to the price he paid for it shortly before to a former owner, which was intended and did influence the purchaser, is actionable deceit. It is settled law that the cost of a thing is a material allegation well adapted to affect the action or judgment of the purchaser, for a false statement of which an action will lie. *Fairchild v. McMahon*, 139

N. Y. 290; *Townsend v. Felthousen*, 156 N. Y. 618; *Van Slochem v. Villard*, 207 N. Y. 587.

(NOTE.) The rule is that the representations of a vendor as to extrinsic facts affecting the quality or value of the subject of the transaction of sale and which are peculiarly within his knowledge may be relied upon by the purchaser, and if the representations are false and he is misled thereby to his injury, he may maintain an action for damages. *Mead v. Bunn*, 32 N. Y. 75; *Hadcock v. Osmer*, 153 N. Y. 604; *Isman v. Laring*, 130 App. Div. 845. An action against the agent and also the principal can be maintained where the agent's fraud caused plaintiff's damages. *Mack v. Latta*, 178 N. Y. 525.

Q. A purchased goods of B on credit and did not disclose his financial standing to B at the time, who would not have sold to him the goods if he had known the facts, A being insolvent at the time. When the debt became due A could not pay, and had no property subject to levy, the goods he purchased from B having been sold in the course of business. B sues A for fraud and deceit. On the above facts who should have judgment and why?

A. Judgment for A. It is well settled in this state that an intent to defraud cannot be imputed to a party who contracts a debt knowing that he is insolvent, merely from the fact of his insolvency, and his omission upon a purchase of goods upon credit to disclose his condition to his vendor. *Nichols v. Pinner*, 18 N. Y. 295; *Wright v. Brown*, 67 N. Y. 9; *People's Bank v. Bogart*, 81 N. Y. 108. "A condition of known insolvency on the part of an intending purchaser of property, accompanied with an intention to acquire the property of his vendor without paying for it, constitutes such a fraud as will make the vendee liable; but the intention not to pay can no more be inferred from the mere fact of insolvency, than the fact of insolvency can be inferred from the existence of an intention not to pay." *Ruger*, Ch. J., in *Morris v. Talcott*, 96 N. Y. 107, 108.

Q. A and B were the owners of adjoining farms. A's ram that had escaped with other sheep from A's farm to B's farm attacked and injured B. A's ram was not known to be vicious and there was no negligence on the part of either A or B in

properly maintaining the line fences. B sues A. Can he recover?

A. Yes. The owner of a domestic animal is liable for all damages which it commits while trespassing on the lands of another. At the time of the injury, the ram which made the attack on B was trespassing upon his premises. This was *prima facie* sufficient to charge the owner with liability for the damages sustained. *Dunkle v. Kocker*, 11 Barb. 389; *Leuvin v. Lyke*, 1 N. Y. 515.

Q. A is engaged in blasting rock on his own land. In the process of blasting some of the rock was thrown on the house of B, doing considerable damage. A used all due care in doing the work. B brings action against A. Can he recover?

A. Yes. The owner of land is liable for committing a trespass on the lands of his neighbor by casting rock thereon, although he exercised all due care in doing the work. Here there was a physical invasion of the land of the plaintiff, and, therefore, the defendant is liable even though there was no negligence. *Hay v. Cohoes*, 2 N. Y. 159, a leading case upon the subject. See also *Pixley v. Clark*, 35 N. Y. 523; *St. Peter v. Denison*, 58 N. Y. 416; *Jutte v. Hughes*, 67 N. Y. 273; *Heeg v. Licht*, 80 N. Y. 583.

Q. A, in building the foundation for his house, is obliged to blast certain rock. Work of blasting causes the building of his neighbor B to shake, doing great damage. B brings action against A for the damages sustained. Conceding that A used all due care in blasting, is he liable to B?

A. No. A is not liable in the absence of negligence, for there was no trespass, no part of the rock having been cast upon B's land. "There are many acts which the owner of land may lawfully do, although they bring annoyance, discomfort or injury to his neighbor, which are *damnum absque injuria*. . . . But here the defendant was engaged in a lawful act. It was done upon his own land to fit it for a lawful business. It was

not an act which, under all circumstances, would produce injury to his neighbor as is shown by the fact that all buildings, near by were not injured. The immediate act was confined to his own land; but the blasts by setting the air in motion or in some other unexplained way, caused an injury to the plaintiff's house. The blasting was necessary, was carefully done, and the injury was consequential. There was no technical trespass. Under these circumstances, we think the plaintiff has no legal ground for complaint." Andrews, Ch. J., in *Booth v. Rome Ry. Co.*, 140 N. Y. 267. See also *Page v. Dempsey*, 184 N. Y. 252.

Q. A has a certain steam boiler upon his land for use in his business. Through no fault of his, the boiler explodes injuring the dwelling house of B, his neighbor. B brings suit against him. Can he recover?

A. No. "Where one places a steam boiler upon his premises and operates the same with care and skill so that it is no nuisance, in the absence of proof of fault or negligence on his part, he is not liable for damages to his neighbor occasioned by the explosion of the boiler. If the explosion was caused by a defect in the manufacture of the boiler he is not liable in the absence of proof that such defect was known to him or was discoverable upon examination or by the application of known tests." *Losee v. Buchanan*, 51 N. Y. 476.

Q. A, while lawfully traveling upon a public highway, was killed by a blow from a piece of rock which fell upon him by reason of a blast exploded by B upon his adjoining land. B, for the lawful purpose of improving his land, was engaged in blasting the rock. He used the most scientific of methods, and was skillful and without negligence. On the trial of an action for damages for causing A's death, the above facts appeared and both sides moved for judgment. Judgment for whom and why?

A. Judgment for A's representatives. "A person who for a lawful purpose and without any negligence or want of skill,

does blasting upon his own land, and thereby causes a piece of rock to fall on a person lawfully traveling on a public highway, is liable for the injury inflicted, and in an action brought against him to recover damages for the death of the person injured by his representatives, it is not essential for the plaintiffs to establish negligence or want of care in order to make out a cause of action." *Sullivan v. Dunham*, 161 N. Y. 290.

(NOTE.) The distinction between this case and that of *Losee v. Buchanan*, *supra*, is, that the latter was not a case of intentional but of an accidental explosion.

Q. A was a law book seller and employed B as porter. B stole certain valuable books, and sold them to C. C in the usual course of his business sold them with other books to D. D sells the books to E. A, discovering the facts and without making any demand upon D for their return, sues him in conversion. D had no knowledge of the theft. Can the action be maintained? Give your reasons.

A. Yes. The act of selling the books to E was an unlawful exercise of ownership over A's property amounting to a conversion, and therefore no demand was necessary. "The assumed sale by the porter of the plaintiffs to Perry was wholly nugatory and conveyed no title. On like grounds, the sale by Perry to the defendants was without effect. They were constructively in possession of the plaintiffs' property without the consent of the latter. The exercise of an act of ownership or dominion over the plaintiffs' property, assuming to sell and dispose of it as their own, was within reason and the authorities, an act of conversion to their own use. The assumed act of ownership was inconsistent with the dominion of the plaintiffs, and this is of the essence of a conversion. Knowledge and intent on the part of the defendants are not material. So long as the defendants had exercised no act of ownership over the property and acted in good faith, a demand and refusal would be necessary to put them in the wrong and constitute conversion. Until such demand, there is no apparent inconsistency with their possession and the plaintiffs' ownership. After a sale had

been made by the defendants they have assumed to be the owners, and will be estopped to deny in an action by the lawful owner the natural consequences of their act, and to resist an action for the value of the goods. As according to these views, the conversion took place at the moment of the unauthorized sale by the present defendants, no demand was necessary; the sole object of a demand being to turn an otherwise lawful possession into an unlawful one by reason of a refusal to comply with it, and thus to supply evidence of a conversion." *Dwight, C., in Pease v. Smith*, 61 N. Y. 447, a leading case, repeatedly followed. *Castle v. Bank*, 148 N. Y. 122; *Tompkins v. Fonda Co.*, 188 N. Y. 261; *MacDonnell v. Buffalo Co.*, 193 N. Y. 92.

Q. A brings an action against B to restrain him from operating a furnace, claiming that it is a nuisance and that the smoke and cinders escaping therefrom annoy him and his family. B defends on the ground that his business is a lawful one, and that he has operated the furnace under the same condition for the past ten years. Judgment for whom and why?

A. Judgment for A. The length of time and the lawfulness of the business are no defense. "If one carry on a lawful trade or business in such a manner as to prove a nuisance to his neighbor, he must answer in damages, and it is not necessary to a right of action that the owner should be driven from his dwelling; it is enough that the enjoyment of life and property be rendered uncomfortable." *Campbell v. Seaman*, 63 N. Y. 568; *Cogswell v. R. R. Co.*, 103 N. Y. 10. The operation of the furnace for ten years did not give a prescriptive right and relief will not be denied the plaintiff unless the nuisance was continued long enough to establish a prescriptive right. *Mulligan v. Elias*, 12 Abb. (N. S.) 209; *Leonard v. Spencer*, 108 N. Y. 347; *Bohan v. P. J. G. L. Co.*, 122 N. Y. 18.

Q. A mill burns soft coal. A's dwelling is near the mill and smoke and cinders enter his house, and also the vibrations of the machinery are felt there. It also affects all other residents

in the locality in the same manner. A brings action in tort for damages. Can he recover, and why?

A. Yes, as he has sustained special damage. "The evidence showed that other houses in the vicinity were affected similarly as those of the plaintiff. The ground of the motion was that as the stench injured a large number of houses the nuisance was common, and therefore no one could maintain an action for his particular injury, the only remedy being an indictment for the common injury to the public. The error of this is obvious both upon principle and authority. The idea that if by a wrongful act a serious injury is inflicted upon a single individual, a recovery may be had therefor against the wrongdoer, and if by the same act numbers are so injured, no recovery can be had by anyone is absurd. The rule is that one erecting and maintaining a common nuisance is not liable to an action at the suit of one who had sustained no damage therefrom, except such as are common to the entire community, yet he is liable to one who has sustained damages peculiar to himself. No matter how numerous the persons may be who have sustained this peculiar damage, each is entitled to compensation for his injury." Grover, J., in *Francis v. Schoellkopf*, 53 N. Y. 152. "The mere fact of a business being carried on which may be shown to be immoral, and therefore prejudicial to the character of the neighborhood, furnishes of itself no ground for equitable interference at the suit of a private person; and though the use of property may be unlawful or unreasonable unless special damage can be shown, a neighboring property owner cannot base thereupon any private right of action. It is for the public authorities acting in the common interest to interfere for the suppression of a common nuisance. If the business is unlawful the complainant in a private action must show special damage by which the legitimate use of his adjoining property has been interfered with or its occupation rendered unfit or uncomfortable. That the perpetrator of the nuisance is amenable to the provisions and penalties of the criminal law is not an answer to an action against him by a private person to recover for injuries sustained, and for an injunction against the continued use of his

premises in a similar manner." Gray, J., in *Cranford v. Tyrrell*, 128 N. Y. 341. See also *Kavanagh v. Barber*, 131 N. Y. 211; *Acherman v. Trul*, 175 N. Y. 353.

Q. A goes upon B's premises seeking employment as a farm hand. While upon the premises a defective steam boiler explodes and severely injures him. He brings action against B. Can he recover?

A. No. "A person who goes upon the land of another without invitation to secure employment of the owner of the land, is not entitled to indemnity from such owner for an injury happening from the operation of a defective machine on the premises not obviously dangerous which he passes in the course of his journey. So it may be shown that the owner might have ascertained the defect by the exercise of reasonable care, he owed no legal duty to a stranger coming upon his premises which required him to keep the machinery in repair." *Larmore v. Iron Co.*, 101 N. Y. 391. This rule has been followed in *Sterger v. VanSicklem*, 132 N. Y. 499; *Walsh v. R. R. Co.*, 145 N. Y. 301; *Birch v. City of N. Y.*, 190 N. Y. 403, and also in *Hickock v. Auburn Co.*, 200 N. Y. 471, where it was said: "The owner or occupier of real property is under no obligation to make it safe, or to keep it in any particular condition for the benefit of trespassers, intruders, mere volunteers or bare licensees, coming upon it without his invitation, express or implied."

Q. A brings action against B for negligence. B demurs to A's complaint on the ground that it does not state that the plaintiff was free from contributory negligence, and hence does not state facts sufficient to constitute a cause of action. What should be the decision on the demurrer?

A. The demurrer should be overruled. "It is not essential that the complaint in an action for negligence shall allege the absence of contributory negligence on the part of the plaintiff; such an allegation is substantially involved in the averment that the injury complained of was caused by the defendant's

negligence. To prove this averment it is necessary, and the burden is upon the plaintiff to establish that his own negligence did not cause or contribute to his injury." *Lee v. Troy Gas Co.*, 98 N. Y. 115; *Bogardus v. R. R.*, 62 App. Div. 376.

Q. A farmer owned a farm which was crossed by a railroad track over which was the usual farm crossing. While attempting to drive his herd of cows from the pasture to the barn across the railroad track upon the farm crossing, the cows huddled together on the railroad track. A train was approaching and X while endeavoring to save his cows by getting them over the track before the train reached the crossing, was himself struck by the train and killed. Upon the trial of an action against the railroad company, brought by X's wife to recover damages sustained by his death, the only question of law raised was the alleged contributory negligence of X. Was the plaintiff entitled to recover? Give reasons in full.

A. No, as X had no right to put himself in a dangerous situation to protect his cattle; in doing so he was guilty of negligence. *Eckert v. R. R.*, 43 N. Y. 502. "A person cannot place himself in a position of danger simply for the protection of his property as by going upon a railroad track at a farm crossing, knowing that a train is approaching for the purpose of endeavoring to save his cattle by getting them over the track before the train reached the crossing, without being guilty of negligence as will preclude a recovery for a personal injury received in so doing." *Morris v. Lake Shore & Mich. So. Ry. Co.*, 148 N. Y. 182.

Q. A child of the age of four years while playing in the middle of the street is run over by one of the cars of the X Street Railway Company. The parent brings action against the company. The company defends on the ground that the child was guilty of contributory negligence. Is this defense good?

A. Yes. "Where a child of such tender age as not to possess sufficient discretion to avoid danger is permitted by his parents to be in a public highway without anyone to guard

him, and is there run over by a traveler and injured, the traveler is not liable. In such an action if the plaintiff is negligent there can be no recovery, and although the child by reason of tender age is incapable of using that ordinary care which is required of a discreet and prudent person, the want of such care on the part of the parents and guardians of the child furnishes the same answer to an action by the child as would its omission on the part of the plaintiff in an action by an adult." *Hartfield v. Roper*, 21 Wend. 615. This case although much criticised is the settled law of this state, and the negligence of the custodian must be imputed to a plaintiff *non sui juris*. See *Mangan v. R. R.*, 38 N. Y. 455; *Huerzeller v. R. R.*, 139 N. Y. 490; *Costello v. R. R.*, 161 N. Y. 317; *Simkoff v. R. R.*, 190 N. Y. 256; *Jacobs v. Koehler S. G. Co.*, 208 N. Y. 418.

Q. B, the infant child of A, is injured by the negligence of a railroad company. In an action by A against the company, what damages are recoverable?

A. "In an action brought by a parent for the loss of services of a minor child disabled by the tortious acts of the defendant, plaintiff is entitled to recover not only for loss of services up to the time of trial, but for the prospective loss during the child's minority; also for expenses actually and necessarily incurred or which are immediately necessary in consequence of the injury in the care and cure of the child, but not for future prospective contingent expenses of this kind. It seems that such expenses can only be recovered, if at all, in an action by the child." *Cumming v. R. R.*, 109 N. Y. 95; *Weis v. Rosenbaum*, 115 N. Y. Supl. 121.

Q. A was traveling on a public highway when B's building collapsed; a part of the same struck and severely injured him. He brings action against B, and at the trial shows the above facts and rests. Both sides move for judgment. What should be the ruling of the court?

A. Judgment for A, as negligence is presumed from the happening of such an accident. "The owner of a building adjoin-

ing a street or highway is under a legal obligation to take reasonable care that it is kept in proper condition so that it shall not fall into the street and injure persons lawfully there. From the happening of such an accident, in the absence of explanatory circumstances, negligence will be presumed, and the burden is upon the owner of showing the use of ordinary care." *Mullen v. St. John*, 57 N. Y. 567. This is the so-called rule of *res ipsa loquitur*, and has been followed in many cases. *Volkmar v. Ry. Co.*, 134 N. Y. 418; *Wolf v. Amer. Tract Soc.*, 164 N. Y. 33; *Griffen v. Manice*, 166 N. Y. 188; *Cunningham v. Dady*, 191 N. Y. 156. See also *Hogan v. Manhattan El. Road*, 149 N. Y. 23, as to the presumption of negligence arising from the falling of articles from the elevated structure into the streets.

Q. A is a passenger on a train of the X Railroad. While in the course of the journey a collision occurs between the train on which he is riding and a train of the Y Railroad, through which A receives severe injuries. The engineers of both trains were guilty of negligence. He brings action against the Y Railroad which defends on the ground that the engineer of the train on which A was riding was guilty of negligence. Judgment for whom and why?

A. Judgment for A. The negligence of the engineer of the train on which A was riding is not imputable to him. "He was a passenger on the cars, conducting himself as he lawfully ought, having no control over the train or its management, on the contrary bound to submit to the regulations of the company and the directions of their officers. To say that he is chargeable with negligence because they have been guilty is plainly not founded on any fact of conduct on his part, but is mere fiction." *Chapman v. R. R.*, 19 N. Y. 341; *Ward v. R. R.*, 206 N. Y. 88.

Q. A invites B for a carriage ride. They both sit on the seat of the vehicle. Through A's negligence a collision occurs with another carriage driven by C, the owner; the latter was also guilty of negligence. B sustains severe injuries and brings action against C. Can he recover?

A. No. "The rule that the negligence of a vehicle may not be imputed to a passenger in an action to recover damages for injuries alleged to have been occasioned by defendant's negligence, is only applicable to cases where the relation of master and servant or principal and agent does not exist, or where the passenger is seated away from the driver or is separated from him by an inclosure and is without opportunity to discover danger and to inform the driver. It is no less the duty of a passenger when he has the opportunity to do so, than of the driver to learn of danger and avoid it if practicable." *Brickell v. R. R.*, 120 N. Y. 290; *Robinson v. R. R.*, 66 N. Y. 11; *Hoag v. R. R.*, 111 N. Y. 199; *Noakes v. R. R.*, 121 App. Div. 722; *Wood v. R. R.*, 133 App. Div. 272.

CHAPTER XVIII

Trusts

Q. A, by his will, leaves certain lands in trust to apply the rents and profits to the use of two persons who are living, and then to convey to Yale College. Is the trust valid?

A. Yes, as the power of alienation is not suspended for more than two lives in being. Section 42 of the Real Property Law (Consolidated Laws, chap. 50), governing the suspension of the power of alienation, is as follows: "The absolute power of alienation is suspended, when there are no persons in being by whom an absolute fee in possession can be conveyed. Every future estate shall be void in its creation, which shall suspend the absolute power of alienation, by any limitation or condition whatever, for a longer period than during the continuance of not more than two lives in being at the creation of the estate; except that a contingent remainder in fee may be created on a prior remainder in fee, to take effect in the event that the persons to whom the first remainder is limited, die under the age of twenty-one years, or on any other contingency by which the estate of such persons may be determined before they attain full age. For the purposes of this section, a minority is deemed a part of a life, and not an absolute term equal to the possible duration of such minority." *Ogilby v. Hickock*, 144 App. Div. 61, aff'd in 202 N. Y. 614.

Q. A by his will devises real property to B, in trust to pay over the rents and profits to C, D and E during their joint lives, and on the death of all, to convey it to F in fee. The instrument also gives power to B to sell the land at any time and deliver the proceeds to F. Is it a valid trust? If so, why? If not, why not?

A. Yes, the trust is valid. "Where the trustee is empowered to sell the land, without restriction as to time, the power of alienation is not suspended, although the alienation may in fact be postponed by the nonaction of the trustee, or in consequence of a discretion reposed in him by the creator of the trust. The statute of perpetuities is pointed only to the suspension of the power of alienation, and not at all to the time of its actual exercise. Where a trust for sale or distribution is made, without restriction as to time, and the trustees are empowered to receive the rents and profits pending the sale for the beneficiaries, the fact that the interest of the beneficiaries is inalienable by statute, during the existence of the trust, does not suspend the power of alienation, for the reason that the trustees are persons in being who can at any time convey an absolute fee in possession." *Robert v. Corning*, 89 N. Y. 225; *Henderson v. Henderson*, 113 N. Y. 1. See also *Sawyer v. Cubby*, 146 N. Y. 192; *Matter of Wilcox*, 194 N. Y. 305.

Q. A executed a deed by which he granted an estate for life to B, and then an estate to C for life, to take effect upon B's death, and then a life estate to D, and then the fee to E. What is the effect of the deed?

A. As to the first two life estates the deed is valid, but as to the third it is void and after the death of the first two life tenants the estate vests in the remainder-man in fee, as if no other life estate were granted. *Purdy v. Hoit*, 92 N. Y. 446. Section 43 of the Real Property Law, provides for this as follows: "Successive estates for life shall not be limited, except to persons in being at the creation thereof; and where a remainder shall be limited on more than two successive estates for life, all the life estates subsequent to those of the two persons first entitled thereto shall be void, and on the death of those persons, the remainder shall take effect, in the same manner as if no other life estates had been created."

Q. A will contains a clause, by which a sum of money is given to a trustee to invest in securities of any kind, and accumulate the profits for a term of twenty years, and then to pay

the fund with the income to the children of the testator in equal shares. Is the trust valid?

A. The trust is not valid. Section 11 of the Personal Property Law (Consolidated Laws, chap. 41) provides as follows: "The absolute ownership of personal property shall not be suspended by any limitation or condition, for a longer period than during the continuance and until the termination of not more than two lives in being at the date of the instrument containing such limitation or condition; or, if such instrument be a last will and testament, for not more than two lives in being at the death of the testator. In other respects limitations of future or contingent interests in personal property, are subject to the rules prescribed in relation to future estates in real property." The power of alienation is here suspended during a fixed and arbitrary period of time, suspended by the provision which compels the holding of the estate in the hands of the trustee intact, during twenty years subsequent to the death of the testator, the holding being merely for the purpose of accumulation during that time, of the interest and income. The provision violates the statute in this respect, that the period during which the power of alienation is suspended thereby is not measured by lives. The trust that is created by the provision is not determinable within any two ascertained lives; the trust is not limited by lives, but by a fixed period, and under the statute, the trust, in order to be valid, must be measured by lives. *Rice v. Barrett*, 102 N. Y. 161; *Staples v. Hawes*, 39 App. Div. 548; *Bindrin v. Ulrich*, 64 App. Div. 444; *Matter of Berry*, 154 App. Div. 510.

Q. A dies leaving a will by which his estate is given to his wife upon certain trusts, the trust being to hold the estate for her use, and the maintenance and support of the children, until the youngest child living at the death of the testator should arrive at the age of twenty-one, or would arrive at the age of twenty-one if living. This provision is attacked on the ground that it unlawfully suspends the power of alienation. What should the decision be?

A. The provision is void, because an arbitrary time is fixed, the time when the infant if living would have attained the age of twenty-one, during which time the power of alienation is suspended. The period during which the power of alienation is suspended is not measured by two lives, but by an arbitrary and fixed time. In this respect, the provision contravenes the statute, and is therefore void. *Haynes v. Sherman*, 117 N. Y. 433; *Dana v. Murray*, 122 N. Y. 604; *Herzog v. Title G. & T. Co.*, 177 N. Y. 99.

Q. A, by his will, leaves his property in trust to his executors, to pay the income to his widow for twenty years, and at the end of that period to divide it among his children. Is the trust valid?

A. The trust is valid. The power of alienation is not suspended for more than one life in being, as the trust terminates if the widow dies before the expiration of twenty years; for the object of the trust being the payment of the income, would be fulfilled upon her death, and the trust would therefore cease with her life. The trust is therefore measured by her life, and being measured by a life, and not by an arbitrary period of time, comes within the statute, and is therefore valid. Section 109 of the Real Property Law (Consolidated Laws, chap. 50) provides as follows: "When the purpose for which an express trust is created ceases, the estate of the trustee shall also cease." The trust is valid under this section, as the widow's death would terminate the trust, for the estate of a trustee ceases, and the trust terminates with the death of the beneficiary. *Case v. Case*, 16 Misc. 393; *Harvey v. Brisben*, 143 N. Y. 151.

Q. A, by his will, devises his real estate in trust, to keep the property intact, and to accumulate the income until his son C became thirty years of age, and then to give him the property and the accumulated income. At the time A died, C was nineteen years of age. C consults you as to the legal effect of the trust. What is your advice?

A. The trust is valid until C becomes twenty-one years of age, according to sec. 61 of the Real Property Law (Consolidated Laws, chap. 50), which in part is as follows: "All directions for the accumulation of the rents and profits of real property, except such as are allowed by statute, shall be void. An accumulation of rents and profits of real property, for the benefit of one or more persons, may be directed by any will or deed sufficient to pass real property, as follows: 1. If such accumulation be directed to commence on the creation of the estate out of which the rents and profits are to arise, it must be made for the benefit of one or more minors then in being, and terminate at or before the expiration of their minority. 2. If such accumulation be directed to commence at any time subsequent to the creation of the estate out of which the rents and profits are to arise, it must commence within the time permitted, by the provisions of this article, for the vesting of future estates, and during the minority of the beneficiaries, and shall terminate at or before the expiration of such minority. 3. If in either case, hereinbefore provided for, such directions be for a longer term than during the minority of the beneficiaries, it shall be void only as to the time beyond such minority." *Pray v. Hegeman*, 92 N. Y. 515; *St. John v. Andrews' Institute*, 191 N. Y. 254.

Q. A bequeathed his personal estate in trust, and after authorizing the expenditure of a certain sum for the support of a minor child, he directed that the unexpended income should be added to the capital of the trust fund, and that the income of the whole fund should be payable to the child after reaching the age of twenty-one. The testator then directed that on the death of the child, the whole fund, including the accumulation of unexpended income, should be paid to the other persons named in the will. On becoming of age, the child consults you. What are his rights?

A. The child is entitled to the income given to him by the provisions of the will, as the direction for the accumulation of the income is valid under sec. 16 of the Personal Property

Law (Consolidated Laws, chap. 41), which is as follows: "An accumulation of the income of personal property, directed by any instrument sufficient in law to pass such property is valid: 1. If directed to commence from the date of the instrument, or the death of the person executing the same, and to be made for the benefit of one or more minors, then in being, or in being at such death, and to terminate at or before the expiration of their minority. 2. If directed to commence at any period subsequent to the date of the instrument or subsequent to the death of the person executing it, and directed to commence within the time allowed for the suspension of the absolute ownership of personal property, and at some time during the minority of the persons for whose benefit it is intended, and to terminate at or before the expiration of their minority. 3. All other directions for the accumulation of the income of personal property, not authorized by statute, are void. In either case mentioned in subdivisions one and two of this section a direction for any such accumulation for a longer term than the minority of the persons intended to be benefited thereby, has the same effect as if limited to the minority of such persons, and is void as respects the time beyond such minority." *Cook v. Lowry*, 95 N. Y. 103; *Smith v. Campbell*, 75 Hun, 155; *Matter of Hinchman*, 141 App. Div. 95.

Q. A, by his will, devises his realty to trustees, to collect the rents and profits, and pay a certain portion for the support of B, his infant son then eight years old, until the infant arrives at age, the remainder of the income to be accumulated until the expiration of B's minority, when the realty and the accumulations are to go to C and D in fee. B died at the age of seventeen. In whom, and when does the legal estate vest, and who is entitled to the accumulations in the hands of the trustees at B's death?

A. The legal estate vests in the remainder-men, C and D, and they are therefore entitled to the accumulations, according to sec. 63 of the Real Property Law (Consolidated Laws,

chap. 50), which is as follows: "When, in consequence of a valid limitation of an expectant estate, there is a suspension of the power of alienation, or of the ownership, during the continuance of which the rents and profits are undisposed of, and no valid direction for their accumulation is given, such rents and profits shall belong to the persons presumptively entitled to the next eventual estate." *U. S. Trust Co. v. Soher*, 178 N. Y. 442; *Matter of Harteau*, 204 N. Y. 292; *Young v. Barker*, 141 App. Div. 801.

Q. A and B were copartners. A misappropriated \$6,000 of the partnership funds, using a portion thereof to purchase a paid-up policy of insurance on his life in the sum of \$5,000, which he made payable to his wife. He paid the premiums of the policy wholly out of the money he misappropriated until his death. The wife was ignorant of her husband's fraud, and in entire good faith, demands the amount of the policy after her husband's death. B, the surviving partner, also demands the amount of the policy. What rights, if any, has he in the matter and on what grounds, and how should he proceed?

A. B, the surviving member of the firm, is entitled to the whole amount of the insurance, as such amount was less than the amount of the firm funds misappropriated by the deceased partner. He should bring an action in equity to enforce the trust which resulted. He had the same rights as would exist against a trustee on behalf of a *cestui que trust*. The surviving partner has the right to follow the funds provided as here, that they can be clearly ascertained, traced and identified. "The right of a wife to insure the life of her husband is not property, and when he uses trust funds in his hands, to procure therewith insurance for her benefit, paying the premiums entirely out of the fund, it may not be said that he has mingled such fund with other property, and that the policy is the product of both; but the *cestui que trust* is entitled to the benefit of the whole policy." *Holmes v. Gilman*, 138 N. Y. 369. See also *Ferris v. Van Hicks*, 170 N. Y. 195.

Q. A father is intrusted with \$10,000 by a will, to hold in trust for his infant son. He buys real estate with the money and takes title in his own name. He subsequently sells the same to a third party, who pays full value and has no notice of the fact. The son on becoming of age consults you. What would you advise?

A. He cannot follow the property into the hands of the third party as the latter is a bona fide purchaser; his only remedy is by an action against the father. "In courts of equity, the doctrine is well settled and uniformly applied, that when a person standing in a fiduciary relation misapplies or converts a trust fund into another species of property, the beneficiary will be entitled to the property acquired. The doctrine is illustrated and applied most frequently in cases of trust, where trust moneys have been, by the fraud or violation of duty of the trustee, diverted from the purposes of the trust, and converted into other property. In such cases, a court of equity will follow the trust fund into the property into which it has been converted, and appropriate it for the indemnity of the beneficiary. It is immaterial in what way the change has been made, whether money has been laid out in land, or land has been turned into money, or how the legal title to the converted property has been placed. Equity only stops the pursuit when the means of ascertainment fail, or the rights of bona fide purchasers for value and without notice of the trust have intervened." *Newton v. Porter*, 69 N. Y. 133; *Welch v. Polley*, 177 N. Y. 117; *Lightfoot v. Davis*, 198 N. Y. 261; *Jaffe v. Weld*, 155 App. Div. 110. Section 95 of the Real Property Law (Consolidated Laws, chap. 50), shows that the son in this case cannot claim that a trust for his benefit resulted in the property as against the bona fide purchaser. This section provides as follows: "An implied or resulting trust shall not be alleged or established, to defeat or prejudice the title of a purchaser, for a valuable consideration without notice of the trust." *Reitz v. Reitz*, 80 N. Y. 538; *Hoach v. Weicken*, 118 N. Y. 67.

Q. X devises a piece of real property to his niece Y for life,

and remainder to Z on Y's death, with the power to Y, during her life to sell the same and use the proceeds to her own use. A creditor has recovered a judgment against Y and issues an execution and attempts to sell the property under his execution. What are Z's rights in the matter on the above facts?

A. Z cannot prevent the sale as Y had the absolute power of disposition as she was granted the power to dispose of the entire fee for her own benefit. It is the same as an absolute ownership when not accompanied by a trust. The estate for life or years when the power is exercised is thus changed into a fee. This rule has been well settled. *Gamond v. Jones*, 2 Hill, 574; *Terry v. Wiggins*, 47 N. Y. 516; *Coleman v. Heach*, 97 N. Y. 558; *Van Horne v. Campbell*, 100 N. Y. 123. The Real Property Law, sec. 149, has continued this rule and is as follows: "Where an absolute power of disposition, not accompanied by a trust, is given to the owner of a particular estate for life or for years, such estate is changed into a fee absolute in respect to the rights of creditors, purchasers and incumbrancers, but subject to any future estates limited thereon, in case the power of absolute disposition is not executed, and the property is not sold for the satisfaction of debts." See also *Farmers' Loan & Trust Co. v. Kib*, 192 N. Y. 266; *Stafford v. Washburn*, 145 App. Div. 784. See also secs. 150 to 153, inclusive, of the Real Property Law (Consolidated Laws, chap. 50).

Q. A gives his attorney, B, \$5,000 to invest in bond and mortgage. B takes the money and purchases a piece of land with it, taking title thereto in his own name. What are A's rights?

A. A can compel a conveyance to himself, as a trust resulted in his favor, according to sec. 94 of the Real Property Law (Consolidated Laws, chap. 50), which is as follows: "A grant of real property for a valuable consideration, to one person, the consideration being paid by another, is presumed fraudulent as against the creditors, at that time, of the person paying the consideration, and, unless a fraudulent intent is

disproved, a trust results in favor of such creditors, to an extent necessary to satisfy their just demands; but the title vests in the grantee, and no use or trust results from the payment to the person paying the consideration, or in his favor, unless the grantee either, 1. Takes the same as an absolute conveyance, in his own name, without the consent or knowledge of the person paying the consideration, or, 2. *In violation of some trust, purchases the property so conveyed with money or property belonging to another.*" *Reitz v. Reitz*, 80 N. Y. 538; *Hoach v. Weiken*, 118 N. Y. 67.

Q. A father, with the intention of defrauding his creditors, purchases a certain piece of property for \$5,000, but by his direction the deed is drawn in the name of his son. Subsequently, he demands that the son reconvey the land to him, and upon the son's refusal, brings an action in equity, alleging that the son, at the time of the transaction, agreed with him that he would reconvey the property whenever the father so desired. Judgment for whom and why?

A. Judgment for the son. "Voluntary conveyances are effectual as between the parties, and cannot be set aside by the grantor though he afterwards becomes dissatisfied with the transaction. Where land is purchased by a father and paid for by him, but the conveyance is made to his son by the direction of the father for the purpose of defrauding the creditors of the latter, no trust will result in favor of the father in consequence of his having paid the consideration money; but as between the father and the son, the conveyance is absolute and vests in the son the entire legal and equitable interest." *Proseus v. McIntyre*, 5 Barb. 424; *McCartney v. Letsworth*, 119 App. Div. 547; *Binkowski v. Moskiewitz*, 144 App. Div. 161.

Q. G, a widow, was the owner of a piece of property in the City of New York, on which there was a mortgage. She had three children, all of whom, except a son, H, were infants. Being unable to manage the property, she conveyed the same

to H without consideration in pursuance of a parol agreement and promise, by H, to hold the same for the benefit of the children, in common with himself. H was to have the accruing rents, and was to pay the interest on the mortgage and the taxes on the property. Thereafter G died. H performed his agreement during her life and for some time thereafter. He then sold the property and with part of the proceeds bought other real estate and took title thereto in his own name. Thereafter he repudiated his parol agreement and claimed to be the owner of the property. What rights and remedy, if any, have the other children? How does the Statute of Frauds affect the case?

A. They have the right to bring an action in equity to compel performance of the agreement. In *Goldsmith v. Goldsmith*, 145 N. Y. 313, a case exactly in point, it was held: "That the arrangement was founded upon the relation of mother and son, and brothers and sisters, and involved the trust and confidence growing out of these relations; that the denial by defendants of the rights of the plaintiffs was a fraud upon them and upon the purpose of the deceased mother; that, conceding no express trust was created, a trust might be implied and properly enforced to prevent and redress the fraud, which trust is unaffected by the Statute of Frauds. When a person, through the influence of a confidential relation, acquires title to property, the court, to prevent an abuse of confidence, may impress upon the property an implied trust and so grant relief." See also *Fairchild v. Edsar*, 154 N. Y. 199.

(NOTE.) "Where a grantor in contemplation of death and for the purpose of making an equitable disposition of his property between those entitled to it, has conveyed it to his wife, who had no other property, upon her express promise, which was a part of the consideration of the conveyance, that she would pay a specified sum to his grandchild, while no express trust is created by the deed or her promise, upon her refusal to pay, equity will declare the grantee a trustee *ex male ficio* for the protection of the intended beneficiary, the trust not affecting the deed, but acting upon the gift as it reaches the possession of the grantee, and will compel payment out of the property conveyed." *Ahrens v. Jones*, 169 N. Y. 555.

Q. A executed and delivered to a New York Trust Co. a deed of trust to his real estate, the income of which he directed

should be paid to him during his life, and at his death the property should be conveyed to persons designated in his will, or to his heirs at law in case no such persons are designated. Thereafter A becomes indebted to B for \$10,000. B obtains judgment against A for the \$10,000; execution is returned unsatisfied. What is the nature and effect of the trust deed, and what are the rights of B?

A. The trust is void and B can follow the property. "A person will not be allowed to put his property in trust with remainder over, reserving to himself the life interest subject to the expenses of the trust, and thereby put the life interest beyond the reach of creditors whose claims arose after the creation of the trust. A trust created by the debtor, and by which he is the beneficiary, does not protect his interest from the claims of creditors." *Schenck v. Barnes*, 156 N. Y. 316.

Q. A is trustee of an estate. He puts \$5,000 of the trust funds in a bank together with \$5,000 of his own money. The entire amount was credited to him personally. The bank fails. No fraud is charged against the trustee. Is he liable to the estate for the loss sustained?

A. The trustee is liable. "A strict observance of established rules requires that trust funds received for investment, in the absence of any discretion in the matter, shall be invested as speedily as it is reasonably possible, in the modes which the law recognizes to be prudent and proper. While awaiting investment or distribution, it is manifestly in the line of the more correct performance of the trustee's duty, that he shall place and hold them separately and apart from his own funds. If he fail to do so, and loss ensues, he becomes personally liable." *Matter of Nesmith*, 140 N. Y. 609.

Q. For what purposes may trusts be created in this state?

A. Trusts may be created for the four purposes mentioned in sec. 96 of the Real Property Law (Consolidated Laws, chap. 50), which are as follows: "1. To sell real property for the

benefit of creditors. 2. To sell, mortgage or lease real property for the benefit of annuitants or other legatees, or for the purpose of satisfying any charge thereon. 3. To receive the rents and profits of real property, and apply them for the use of any person, during the life of that person, or for any shorter term, subject to the provisions of law relating thereto. 4. To receive the rents and profits of real property, and to accumulate the same for the purposes, and within the limits, prescribed by law."

Q. A goes to the X Savings Bank and opens an account in the name of B. A does not inform B of what he has done, nor does he at the time of making the deposit, make any statement or declaration to the receiving teller beyond giving his name, address, etc. A subsequently dies intestate, and his heirs and B both claim the money. Who is entitled to it? State your reasons.

A. The heirs are entitled to the money. "To constitute a trust there must be either an explicit declaration of trust or circumstances which show beyond reasonable doubt that a trust was intended to be created. A trust may not be implied from a mere deposit in a savings bank by one person in the name of another. To constitute a valid gift of personal property there must be on the part of the donor an intent to give and a delivery in pursuance of such an intent, of the thing given to or for the donee. The delivery may be either by actually transferring the manual custody of the thing given to the donee, or by giving to him the symbol which represents possession. The delivery, however, whether actual or constructive, must be such as will operate to divest the donor of possession of and dominion over the subject of the gift. While a deposit in a savings bank by one person of his own money, in the name of another, is consistent with an intent on the part of the depositor to give the money to the other, it does not alone, unaccompanied by any declaration of intention, authorize a finding that the deposit was made with that intent, at least where the deposit was to a new account, and the depositor received and retained a pass-book, the possession and retention of which, by the rules of the bank, known to the

depositor, is made the evidence of a right to draw the deposit." *Beaver v. Beaver*, 117 N. Y. 421; *McMahon v. Cronin*, 143 App. Div. 842; *Matter of Van Alstyne*, 207 N. Y. 306.

Q. A goes to the X Bank and opens an account in his own name in trust for B, an old college friend. He does not notify B that he has opened such an account, nor does he deliver the bank book to B. A thereafter dies and the heirs and B both claim the amount in the bank. Who is entitled to the money and why?

A. B is entitled to the money. "The doctrine laid down by this court in the previous cases amounts to this, that the act of a depositor in opening an account in a savings bank in trust for a third party, the depositor retaining possession of the bank book and failing to notify the beneficiary, creates a trust if the depositor dies before the beneficiary, leaving the trust account open and unexplained." *Bartlett, J.*, in *Cunningham v. Davenport*, 147 N. Y. 47. See also *Haux v. Dry Dock Sav. Inst.*, 154 N. Y. 736; *Matter of Barefield*, 177 N. Y. 387. The cases where one makes a deposit in the name of another and where one makes a deposit in trust for another must be distinguished. In the former in the absence of expressed intention no trust is created; in the latter case unexplained, a presumption that a trust was intended, arises. "A deposit by one person of his own money in his own name as trustee for another, standing alone, does not establish an irrevocable trust during the lifetime of the depositor. It is a tentative trust merely, revocable at will, until the depositor does or completes the gift in his lifetime by some unequivocal act or declaration, such as delivery of the pass-book or notice to the beneficiary. In case the depositor dies before the beneficiary without revocation, or some decisive act or declaration of disaffirmance, the presumption arises that an absolute trust was created as to the balance on hand at the death of the depositor." *Matter of Totten*, 179 N. Y. 112.

Q. A recovers judgment against B. B has no property, except the income of a trust fund which he receives under the

provisions of a will made by his father. A issues execution on the judgment, and the execution is returned unsatisfied. He consults you as to whether or not he can reach the trust fund. What would you advise him?

A. He can reach the sum in excess of the amount necessary for B's support and education, according to sec. 98 of the Real Property Law (Consolidated Laws, chap. 50), which is as follows: "Where a trust is created to receive the rents and profits of real property, and no valid direction for accumulation is given, the surplus of such rents and profits, beyond the sum necessary for the education and support of the beneficiary, shall be liable to the claims of his creditors in the same manner as other personal property, which cannot be reached by execution." *Buttar v. Baudome*, 177 N. Y. 530, aff'g 84 App. Div. 215; *Tooles v. Wood*, 99 N. Y. 616.

(NOTE.) Code of Civ. Pro., sec. 1391, permits an execution upon a judgment for necessities to be issued and requires payment upon the judgment of ten per cent of the income of the trust fund. See also *King v. Irving*, 103 App. Div. 420; *Sloane v. Tiffany*, 103 App. Div. 540; *Brearley School v. Ward*, 201 N. Y. 358.

Q. A dies leaving his entire estate to B in trust for the support and maintenance of his only son C, with power in C to declare the trust at an end when he (C) becomes twenty-five years of age, and to take possession of the entire estate. A judgment was entered against C for a business debt when he was twenty-four years of age. There is no other property of C's, and the trustee refuses to pay the same. C, on becoming twenty-five years of age, refuses to declare the trust at an end. How can the judgment be collected? Why?

A. The judgment can be collected from the trust estate when C becomes twenty-five years of age. One cannot by keeping his property in trust defeat the just demands of his creditors, therefore when C arrived at the age designated in the instrument creating the trust, he was entitled to the possession of the estate, and his refusal to declare the trust at an end, would not relieve his estate from his debts. In the early

case of *Hallett v. Thompson*, 5 Paige, 583, Chancellor Walworth said that: "It was contrary to public policy to permit a person to have the absolute and uncontrolled ownership of property for his own purposes, and to be able at the same time to keep it from his creditors." This case has been frequently cited with approval and followed. *Williams v. Thorn*, 70 N. Y. 273; *Wendt v. Walsh*, 164 N. Y. 154; *Ullman v. Cameron*, 186 N. Y. 339. In the case last cited Vann, J., at p. 345 says: "Although possession and title are thus subject to his control, it is insisted that until he calls for possession the property is not liable for his debts. The law will not endure this when creditors ask its aid to prevent it, but will declare the estate to be vested as to them."

CHAPTER XIX

Wills and Administration

Q. A, nineteen years of age, makes a will leaving all her personal property to her brother Thomas, and all her real property to her brother John. This will is attacked on the ground of the infancy of the testatrix. Is the will good? How far good, if good at all?

A. As to the personal property the will is good, but as to the real estate the will is not good, being made by a minor. The law of this state is that an infant cannot make a will of real estate, according to sec. 10 of Decedent Estate Law (Consolidated Laws, chap. 13), which is as follows: "All persons, except idiots, persons of unsound mind and infants, may devise their real estate, by a last will and testament, duly executed, according to the provisions of this article." As to the personal property the will of a male of eighteen years or over, and of a female of sixteen years or over, is valid. Section 15 of Decedent Estate Law so provides, and is as follows: "Every male person of the age of eighteen years or upwards, and every female of the age of sixteen years or upwards, of sound mind and memory, and no others, may give and bequeath his or her personal estate, by will in writing." See *Matter of Freeman*, 46 Hun, 548; *Wells v. Seeley*, 47 Hun, 109.

Q. Objections had been duly filed to the probate of the last will and testament of B on the ground that at the time of its execution, B was of unsound mind and incompetent. A, who was not a witness to the will, and who was a nonprofessional and not an expert, but of unusual intelligence and very familiar with the acts and conduct of B, was called as a witness to show the competency of B. How, and to what extent, can his

opinion be given in evidence on the question involved? Answer fully.

A. In this state, A would be merely allowed to testify to acts of the testator observed by him, and to characterize them as rational or irrational, and give the impression produced thereby on his mind. But he would not be allowed to state his opinion as to the testator's sanity or insanity. "Where non-professional witnesses, who did not attest the execution of a will, are examined as to matters within their own observation, bearing upon the competency of the testator, they may characterize, as in their opinion, rational or irrational, the acts and declarations to which they testify, but the examination must be limited to their conclusions from the specific facts they disclose, and they cannot be permitted to express their opinions on the general question whether the mind of the testator was sound or unsound. An exception to this rule is admitted in the case of attesting witnesses, whose testimony relates to the condition of the testator at the very time of executing the will, and who may well retain a recollection of the general result of their observation after the particular circumstances have been effaced by lapse of time." *Clapp v. Fullerton*, 34 N. Y. 490, a leading case. *Dougherty v. Milliken*, 163 N. Y. 527; *In re Campbell's Will*, 136 N. Y. Supp. 1086; *Will of Sandberg*, 75 Misc. 38.

Q. A was an invalid and lived with B for several years preceding his death. He was attended and nursed by B with great care and attention. He told B that he would provide for him in his will as a reward for his kindness. A, by his will, leaves most of his property to B. The relatives of A contest the will on the ground of undue influence. It does not appear that B coerced or forced A into making the will. Shall probate be granted? Answer fully.

A. Probate should be granted, as the facts do not show undue influence. "To make a good will a man must be a free agent. But all influences are not unlawful. Persuasion appeals to the affection or ties of kindred, to a sentiment of grat-

itude for past services, or pity for future destitution, or the like—these are all legitimate and may be fairly pressed on a testator. On the other hand, pressure of whatever character, whether acting on the fears or the hopes, if so exerted as to overpower the volition without convincing the judgment, is a species of restraint under which no valid will can be made. Importunity or threats, such as the testator has not the courage to resist, moral command asserted and yielded to for the sake of peace and quiet, or escaping from distress of mind or social discomfort, these, if carried to a degree in which the free play of the testator's judgment, discretion or wishes is overborne, will constitute undue influence, though no force is either used or threatened. In a word, a testator may be led, but not driven; and his will must be the offspring of his own volition and not the record of some one else's." *Hall v. Hall*, L. R. 1 P. & D. 481. The tests given in this case, as to what constitutes undue influence, have been adopted in this state. See *Tyler v. Gardner*, 35 N. Y. 559; *Rollwagen v. Rollwagen*, 63 N. Y. 519; *Matter of Budlong*, 126 N. Y. 423; *Matter of Seagrist*, 1 App. Div. 619, *aff'd* in 153 N. Y. 682.

Q. A person is about to execute his will. The instrument is ready for execution, and you are called in to advise the proper formalities. What are they?

A. Section 21 of Decedent Estate Law provides as follows: "Every last will and testament of real or personal property, or both, shall be executed and attested in the following manner: 1. It shall be subscribed by the testator at the end of the will. 2. Such subscription shall be made by the testator in the presence of each of the attesting witnesses, or shall be acknowledged by him, to have been so made, to each of the attesting witnesses. 3. The testator, at the time of making such subscription, or at the time of acknowledging the same, shall declare the instrument so subscribed, to be his last will and testament. 4. There shall be at least two attesting witnesses, each of whom shall sign his name as a witness, at the end of the will, at the request of the testator." It is important for the

witnesses to observe the provisions of sec. 22 of Decedent Estate Law, which are as follows: "The witnesses to any will, shall write opposite to their names their respective places of residence; and every person who shall sign the testator's name to any will by his direction, shall write his own name as a witness to the will. Whoever shall neglect to comply with either of these provisions, shall forfeit fifty dollars, to be recovered by any person interested in the property devised or bequeathed, who will sue for the same. Such omission shall not affect the validity of any will; nor shall any person liable to the penalty aforesaid, be excused or incapacitated on that account, from testifying respecting the execution of such will."

Q. What are nuncupative wills, and by whom and under what circumstances, can such wills be made?

A. Section 16 of Decedent Estate Law provides as follows: "No nuncupative or unwritten will, bequeathing personal estate, shall be valid, unless made by a soldier while in actual military service, or by a mariner, while at sea." It should be observed that a nuncupative will is an oral will, and can only be made bequeathing personal property. It is not necessary that a nuncupative will should be made in the last sickness and in prospect of death. *Matter of Thompson*, 4 Bradf. 154; *Matter of O'Connor*, 65 Misc. 403. "Before a nuncupative will is admitted to probate its execution and the tenor thereof must be proved by at least two witnesses." Section 2618 of Code of Civ. Pro.

Q. A was the captain and owner of a coasting vessel. On a certain day, when the vessel was lying at anchor in Delaware Bay inside the breakwater, about a mile from land, he was taken suddenly sick on board and died. Just before his death, he told several witnesses that he wished his wife to have all his property. He did not make any request to them to bear witness that it was his will. The wife applies for probate as of a nuncupative will. The father of A contests the same, claiming that A died intestate. Should probate be allowed?

A. Yes. "The testator was a mariner within the meaning of the statute. A nuncupative will may be made by the master of a coasting vessel whilst on his voyage, though then lying at anchor in an arm of the sea where the tide ebbs and flows. It is enough that the testator, in prospect of death, state his wishes in answer to questions what disposition he desires to make of his property; it is not requisite that he should request those present to witness that such is his will." *Hubbard v. Hubbard*, 8 N. Y. 196.

Q. A, while upon his deathbed and while in full realization of his condition, gave to B his bank book on a savings bank, saying that he gave it to him as his own. Is this gift valid?

A. The gift is valid; it is a gift *causa mortis*. "The gift was consummated by the delivery of the book, and no other formality was necessary to constitute the actual delivery of the bank deposit, needful to vest the possession and title in the donee; any delivery of property is sufficient to effectuate a gift. To consummate a gift, whether *inter vivos* or *causa mortis*, the property must be actually delivered, and the donor must surrender the possession and dominion thereof to the donee. In the case of gifts *inter vivos*, the moment the gift is thus consummated, it becomes absolute and irrevocable. But in the case of gifts *causa mortis*, more is needed. The gift must be made under the apprehension of death from some present disease or some other impending peril, and it becomes void by the recovery from the disease or escape from the peril. It is also revocable by the donor, and becomes void by the death of the donee in the lifetime of the donor. When a gift is made in the apprehension of death from some disease from which the donor did not recover, and the apparent immediate cause of death was some other disease with which he was afflicted at the same time, the gift becomes effectual. It is not needful that the gift be made in extremis when there is no time or opportunity to make a will. In many of the reported cases the gift was made weeks and even months before the death of the donor, when there was abundant time and op-

portunity for him to have made a will." *Ridden v. Thrall*, 125 N. Y. 572. See also *Augsbury v. Shurtliff*, 180 N. Y. 146; *Matter of Spaulding*, 49 App. Div. 548. "To constitute a valid gift *causa mortis*, three things are necessary: 1. It must be made with a view to the donor's death. 2. The donor must die of that ailment or peril. 3. There must be a delivery." *Grymes v. Hone*, 49 N. Y. 17.

Q. A wrote his own will, and taking it to his friends told them that it was his last will and testament, and asked them to witness it. They signed their names as witnesses to the will. Immediately afterwards A signed the will in the proper place, and gave it to one of his friends to keep it for him. One of the relatives of A objects to its admission to probate. What are his rights?

A. Probate should be denied. In this state, the witnesses must sign after the testator has signed, for the fact that the testator has signed is one of the things which the witness is to attest. "It is essential to the due execution of a will, that the witnesses, who are to attest the subscription and publication thereof by the testator, should sign the same after the subscription by him." *Jackson v. Jackson*, 39 N. Y. 153; *Dack v. Dack*, 84 N. Y. 665; *In re Crumb's Will*, 127 N. Y. Suppl. 271.

Q. A drew his will upon a printed blank which was folded in the middle, so as to make four consecutive pages. The attestation clause was at the top of the second page, and the will was executed at that point by the testator and the subscribing witnesses. The third page contained further dispositions of property. The third page was numbered "two," and the second page "three," the draftsman having passed to the third page after he had filled the first. Objections are raised to the admission of the will to probate on the ground that the same was not subscribed at the end to comply with the statute. What should the surrogate do?

A. The will should be refused probate, as it was not properly

executed. "The will was not subscribed by the testator 'at the end of the will' as required by the statute. The doctrine of incorporation cannot be successively invoked, so as to read into such will the alleged second page, as the result would be to permit an invasion of the statute." *Matter of Andrews*, 162 N. Y. 1. The case of *Matter of Field*, 204 N. Y. 448, is called attention to; this case while not overruling *Matter of Andrews*, *supra*, does nevertheless limit it, very strictly.

Q. A makes his will and calls in two subscribing witnesses. He covers up part of the will, and tells the witnesses that because of certain things contained in it, he does not care to let them see it. He tells them that he has signed it, but they cannot see his signature. The witnesses subscribe in the proper place. The will is offered for probate. Objected to. What should be the decision?

A. The will should be denied probate, as it was not properly acknowledged. "There would undoubtedly have been a formal execution of the will, in compliance with the statute, if the witnesses had at the time seen the signature of the testator to the will. Subscribing witnesses are required by law, for the purpose of attesting and identifying the signature of the testator, and that they cannot do, unless at the time of the attestation they see it. And so it has been held in this court. . . . A signature neither seen, identified, or in any manner referred to as a separate and distinct thing, cannot in any just sense be said to be acknowledged by a reference to the entire instrument by name to which the signature may, or may not be at the time subscribed. The formalities prescribed by the statute are safeguards thrown around the testator to prevent fraud and imposition. To this end, the witnesses should either see the testator sign his name, or he should, the signature being visible to him and to them, acknowledge it to be his signature." *Earl, J., In re Mackay's Will*, 110 N. Y. 611. See also *Matter of Keefe*, 155 App. Div. 578.

(NOTE.) "A will should not be refused probate because the attesting witnesses did not look closely to see the testatrix's signature acknowledged

by her, where it was visible and they heard her acknowledgment, and her declaration that the instrument was her last will, and there is no claim of fraud." *Matter of Laudy*, 161 N. Y. 429.

Q. A wrote his will and called in B and C to witness it. After subscribing it, he showed them his signature on the instrument, saying to them: "I declare the within to be my free will and deed." B and C thereupon subscribed their names to the instrument. The witnesses did not know that the paper was a will. Objections are raised to the probate of the will. What should the surrogate do?

A. Probate should be refused. "It will not suffice that the witnesses have elsewhere and from other sources learned that the document which they are called to attest is a will, or that they suspect and infer from the circumstances that such is the character of the paper. The fact must in some manner, although no particular form of words is required, be declared by the testator in their presence, that they not only know the fact, but that they may know it from him, and that he understands it, and at the time of its execution, which includes publication, design to give effect to it as his will, and to do this, among other things, they are required by statute to attest. The declaration that the instrument was his free will and deed, was equivocal, and would be satisfied by a deed executed voluntarily. It did not necessarily inform the witnesses that it was a will by excluding every other instrument from the mind. From the expression they could not know that the testator did not suppose that the instrument was a deed." *Allen, J., in Lewis v. Lewis*, 11 N. Y. 220. See also *Trustees, etc., v. Calhoun*, 25 N. Y. 422; *Matter of Morley*, 140 App. Div. 823.

Q. A wrote his will and summoned two friends to his house for the purpose of witnessing it. They came there, saw the testator subscribe his name, and signed their names as witnesses. Before doing so, one of them asked the testator if he requested him to sign the will as a witness; to which he answered in the affirmative. Both the witnesses then proceeded to sign, the testator and the witnesses all being at a table and in close

proximity to each other. Objection is raised to the probate of the will on the ground that there was not a proper execution. What should be the decision? Answer fully.

A. The will was properly executed, and should be admitted to probate. "Now, the statute, it is true, declares that each witness must sign on such request. But the manner and form in which the request must be made, and the evidence by which it must be proved, are not prescribed. We apprehend it is clear that no precise words, addressed to each of the witnesses at the very time of the attestation, is required. Any communication importing such request, addressed to one of the witnesses in the presence of the other, and which, by a just construction of all the circumstances, is intended for both, is, we think, sufficient. . . . In thus requiring both the witnesses to be present, and in thus answering the interrogatory addressed to him by one of them, we think that he did, in effect, request them both to become the subscribing witnesses to the instrument." Comstock, Ch. J., in *Coffin v. Coffin*, 23 N. Y. 9. See also *Lane v. Lane*, 95 N. Y. 494; *Matter of Hunt*, 110 N. Y. 278.

Q. A signed his will in the presence of the draftsman and the witnesses. B, the draftsman, then, in the presence of the testator and the witnesses, said to the witnesses that the paper A signed was his will, and that he wished them to sign it as witnesses. The witnesses then signed the instrument in the proper place. The testator made no dissent, took the will, and thereafter retained it. It is now offered for probate. Should probate be granted?

A. Yes. There was a valid request to sign. The request need not be made by the testator himself, but can be made by another on his behalf, if the testator assent thereto. Here the conduct of the testator indicated his assent. *Peck v. Cary*, 27 N. Y. 9; *Gilbert v. Knox*, 52 N. Y. 125; *Matter of Nelson*, 141 N. Y. 152.

Q. A executed his will while upon his deathbed. He duly

declared the instrument so executed to be his last will and testament and requested B and C to sign as witnesses. B and C went into an adjoining room and there signed their names as witnesses at the end of the will. Objection is raised to the probate of this will. What should be the decision?

A. The will should be admitted to probate. It is not necessary that the subscribing witnesses should strictly and literally sign their names to the will in the presence of the testator. The statute does not require that the attesting witnesses shall sign in the presence of the testator. *Rudden v. McDonald*, 1 Bradf. 352; *Lyon v. Smith*, 11 Barb. 125; *Matter of Philips*, 34 Misc. 442.

Q. A subscribed her will in the presence of B and C, the attesting witnesses, and declared the same to be her last will and requested them to sign as witnesses. B, then and there in the presence of A, signed his name at the end of the will. C, the other witness, being in a hurry to get home, left at this stage of the proceedings, saying that she would return. Before she returned, however, B, the other witness, within half an hour brought the will to C's house, and C there signed her name as a witness. Was this a proper execution?

A. Yes. The statute does not require the witnesses' signature to be affixed at the moment of the execution of the will, any more than that it should be affixed in the presence of the testator. *Herrick v. Snyder*, 27 Misc. 462.

Q. A will is signed by the testator whose witnesses do not sign in the presence of each other. An objection is made to its admission to probate, as not being properly executed. Is the objection good?

A. The objection is not good, and the will should be admitted to probate. In this state, the statute does not state that the witnesses must sign in the presence of each other, therefore when they sign their names at the end of the will at the request of the testator, it is sufficient. *Hoysradt v. Kingman*, 22 N. Y.

372; *Matter of Diefenthaler*, 39 Misc. 765; *Matter of Engler*, 56 Misc. 218.

Q. A executed his will in the presence of B and the latter signed his name as a witness thereto at the end of the will after being duly requested to do so by A. Shortly thereafter A learning that another witness was required exhibited his signature on the will to C, duly acknowledged the same, requested C to sign the will as a witness, which C thereupon did. Question is raised as to the sufficiency of the execution. What should the surrogate do?

A. Admit the will to probate, as it is a proper execution. The testator may sign in the presence of one witness, and thereafter acknowledge his signature to the other witness. *Willis v. Mott*, 36 N. Y. 485.

Q. A question arises as to the validity of a will which has no attestation clause. What do you say?

A. If the will was in all other respects properly executed, the fact that it has no attestation clause will not invalidate it. *Matter of Cornel*, 89 App. Div. 412.

Q. A will is offered for probate, the signature of the testator is after the attestation clause. Objection is raised as not being a proper subscription. What do you say?

A. As an attestation clause is not necessary to a valid will, the signature after the attestation clause is at the end of the will, and therefore valid. *Younger v. Duffie*, 94 N. Y. 535.

Q. Draw an attestation clause to a will.

A. Signed, published and declared by the above named testator, as and for his last will and testament, in the presence of us, and of each of us, who at his request, and in his presence, and in the presence of each other, have hereunto subscribed our names as subscribing witnesses this 10th day of May, 1915.

John Brown, residing at 100 Fifth Ave., N. Y. City.

Thomas Jones, residing at 175 Fifth Avenue, N. Y. City.

(NOTE.) It is to be observed, that it is not necessary to have an attestation clause at all, but it is useful for the purpose of proving the will. While the above is the usual form, nevertheless, as we have already seen, it is not necessary for the witnesses to sign in each other's presence, or in the presence of the testator.

Q. The will of A is offered for probate. There was a full attestation clause, but the two witnesses denied all its allegations, and also denied that they had signed it. Should probate be allowed?

A. Yes, if the signatures of the witnesses be proved to be their handwriting. "To believe this evidence, requires us to suppose that the testator deliberately forged the names of witnesses to his will, at a time and under circumstances when it was just as convenient to have obtained their genuine signatures thereto. It is quite unreasonable to suppose that such a person having drawn and signed a will, and having added thereto a proper attestation clause, should have provided witnesses therefor, and required them to sign a certificate to the effect that each of the required formalities had then been observed, without also providing for their actual performance. He had knowledge of the necessity of the act required, to the validity of the business he was then transacting, and to hold that he omitted it would oblige us to ascribe to him the intention of performing a vain and useless ceremony at the expense of time and labor to himself, and the commission of a motiveless crime." Ruger, Ch. J., in *Matter of Cottrell*, 95 N. Y. 329. See also *Matter of Walker*, 67 Misc. 6; *Matter of Francis*, 73 Misc. 154.

Q. You are the attorney for the proponents of a will in which one of the subscribing witnesses is dead, and the other does not remember the transaction. What would you do to have the will admitted to probate?

A. Section 2612 of the Code of Civ. Pro. governs a case like this, and is in part as follows: "If all the subscribing witnesses to a written will be dead, or incompetent by reason of lunacy or otherwise, to testify, or unable to testify, or are

absent from the state and their testimony has been dispensed with as provided with in this section, or if a subscribing witness has forgotten the occurrence, or testifies against the execution of the will, or was not present with the other witness at the execution of the will, the will may nevertheless be established, upon proof of the handwriting of the testator, and of the subscribing witnesses, and also of such other circumstances as would be sufficient to prove the will upon the trial of an action."

Q. A draws his will, B and C becoming the subscribing witnesses thereto. B receives a legacy of \$1,000 by the will. The will is offered for probate, and B is called to testify to its execution. His testimony is objected to. Is he a competent witness? What effect, if any, has the fact of his becoming a witness upon his legacy?

A. B loses his legacy, but is nevertheless a competent witness, according to sec. 27 of Decedent Estate Law, which is as follows: "If any person shall be a subscribing witness to the execution of any will, wherein any beneficial devise, legacy, interest or appointment of any real or personal estate shall be made to such witness, and such will cannot be proved without the testimony of such witness, the said devise, legacy, interest or appointment shall be void, so far only as concerns such witness, or any claiming under him; and such person shall be a competent witness, and compellable to testify respecting the execution of the said will, in like manner as if no such devise or bequest had been made. But if such witness would have been entitled to any share of the testator's estate in case the will was not established, then so much of the share that would have descended or have been distributed to such witness, shall be saved to him, as will not exceed the value of the devise or bequest made to him in the will, and he shall recover the same of the devisees or legatees named in the will, in proportion to, and out of, the parts devised and bequeathed to them." See *Jackson v. Dunston*, 4 Johns. 311; *Matter of Brown*, 31 Hun, 166.

(NOTE.) An executor may testify as a subscribing witness without forfeiture of his appointment. *McDonough v. Loughlin*, 20 Barb. 238; *Matter of Will of Wilson*, 103 N. Y. 374. So also where the legatees under a will are the subscribing witnesses to a codicil of the will, this does not prevent them from taking under the will where it alone is proved, and the codicil does not benefit them and is unnecessary to the proof of the will. *Matter of Johnson*, 37 Misc. 334.

Q. A makes his will. Subsequently he writes on a paper that he revokes his will as he is not satisfied with its provisions, and tells no one of the paper and incloses the same in an envelope. Both the will and the paper are found after A's death. The will is offered for probate. Should probate be allowed?

A. The will should be admitted to probate, as there was no proper revocation. "The statute is just as rigid on the subject of written revocations, as in regard to the execution of wills. A revocation in writing, to be valid, must be 'executed with the same formalities with which the will itself was required by the law to be executed.' The testator might have revoked by burning, tearing, canceling, obliterating or destroying; but he selected the mode of revocation by writing, and has failed in accomplishing his object for want of the necessary formalities." *Nelson v. Public Admr.*, 2 Bradf. 210. Section 34 of Decedent Estate Law, governing the revocation of a will, is as follows: "No will in writing, except in the cases hereinafter mentioned, nor any part thereof, shall be revoked, or altered, otherwise than by some other will in writing, or some other writing of the testator, declaring such revocation or alteration, and executed with the same formalities with which the will itself was required by the law to be executed; or unless such will be burnt, torn, canceled, obliterated or destroyed, with the intent and for the purpose of revoking the same, by the testator himself, or by another person in his presence, by his direction and consent; and when so done by another person, the direction and consent of the testator, and the fact of such injury or destruction, shall be proved by at least two witnesses."

Q. A makes his will in which he gives a bequest of \$5,000 to his nephew John. Becoming displeased with the nephew's actions, he takes the will and draws lines through this bequest, intending thereby to revoke the same. What effect, if any, has this upon the will?

A. This has no effect whatever upon the will, as under the New York statute, there cannot be a revocation of a part by obliteration, even if it be done with the intent to revoke the same. No obliteration can be effective unless it altogether destroys the whole will and was intended to do so. A will can only be admitted to probate in the form and condition it was in when originally executed, if that can be ascertained. A will cannot be revoked either in part or in whole, by a cancellation of a part of the instrument. *Lovell v. Quitman*, 88 N. Y. 377; *Burnham v. Comfort*, 108 N. Y. 535; *Matter of Curtis*, 135 App. Div. 745; *Matter of Van Woert*, 147 App. Div. 483.

Q. A, who is unmarried, makes her will leaving all her real and personal property to her mother. She subsequently marries and dies. The will is offered for probate, and is contested by her husband on the ground that her marriage acted as a revocation of her will. What should the surrogate do?

A. The will should be refused probate, as the statute provides that "a will executed by an unmarried woman shall be deemed revoked by her subsequent marriage." This statute has been held good in the face of the Married Women's Acts in *Brown v. Clark*, 77 N. Y. 369, where it is said: "The statute does not make the marriage a presumptive revocation, which may be rebutted by proof of a contrary intention, but makes it operate *eo instanti* as a revocation." See also *Croner v. Cowd-ray*, 139 N. Y. 471. Section 36 of Decedent Estate Law has continued the same language of the former statute.

Q. B, the widow of A, makes her will leaving all her property to her brother John. She subsequently marries C and

dies, leaving him surviving. The executor appointed in the will offered the instrument for probate, but was opposed in his proceedings by C. What should be the decision of the court?

A. The will should be denied probate, as it was revoked by the marriage of B with C. The will of a widow is revoked by her subsequent marriage. "The unmarried woman referred to by the statute must be defined according to that rule of statutory construction which requires that the words used in legal enactments shall be understood and taken in their ordinary and familiar significance. So read, the unmarried woman of the statute is the woman who is not in a state of marriage." *Matter of Kaufman*, 131 N. Y. 620. See also *Near v. Shaw*, 76 Misc. 303.

Q. A, the wife of B, makes a will leaving all her property both real and personal, to her sister. Subsequent to the making of the will, B dies. A thereafter marries C, and dies leaving him surviving. The will is offered for probate. C contests. What should be the decision?

A. The will should be admitted to probate. A will made by a married woman is not deemed revoked by her marrying again after an intervening widowhood. *Matter of McLarney*, 153 N. Y. 416. It will be observed that the will here was made by a woman *who was married at the time she executed it*. So also where a married woman makes a will, is subsequently divorced and remarries, the will is not revoked. *Matter of Burton*, 4 Misc. 512.

Q. A makes a will leaving all his property to his brother. He afterwards marries, has a child, and dies without making any change in his will leaving the child him surviving. The will is offered for probate. Should probate be allowed?

A. Probate should be denied, as the will was revoked by the testator's subsequent marriage, and birth of issue unprovided for. Section 35 of Decedent Estate Law provides for this as

follows: "If after the making of any will, disposing of the whole estate of the testator, such testator shall marry, and have issue of such marriage, born either in his lifetime or after his death, and the wife or the issue of such marriage shall be living at the death of the testator, such will shall be deemed revoked, unless provision shall have been made for such issue by some settlement, or unless such issue shall be provided for in the will, or in such way mentioned therein, as to show an intention not to make such provision; and no other evidence to rebut the presumption of such revocation, shall be received." See *Havens v. Van Denburgh*, 1 Denio, 27; *Adams v. Winne*, 7 Paige, 77.

Q. A has \$30,000 in government bonds. He makes a will in 1912, whereby he leaves \$20,000 to his wife, and the rest to his only child. In 1914 he has another child born to him, and dies in 1915, not having made any change in his will, and not mentioning the second child in any way. Will the birth of the second child affect the will, and if so, how?

A. The birth of the second child does not revoke the will, but merely renders it inoperative as to a portion of the estate so as to give the post-testamentary child the share he would have taken had the testator died intestate. This is provided for in sec. 26 of Decedent Estate Law. It is as follows: "Whenever a testator shall have a child born after the making of a last will, either in the lifetime or after the death of such testator, and shall die leaving such child, so after-born, unprovided for by any settlement, and neither provided for, nor in any way mentioned in such will, every such child shall succeed to the same portion of such parent's real and personal estate, as would have been descended or been distributed to such child, if such parent had died intestate, and shall be entitled to recover the same portion from the devisees and legatees, in proportion to and out of the parts devised and bequeathed to them by such will." See *Smith v. Robertson*, 89 N. Y. 556; *Matter of Murphy*, 144 N. Y. 557; *Udell v. Stearns*, 125 App. Div. 196.

Q. A makes a will devising his house and lot to his son John. Subsequently he sells the same and deposits the proceeds (\$10,000) in a bank in his own name, but apart from his own funds, and leaves it intact. He dies. What would you advise as to John's rights?

A. He has no rights whatever, as the devise was revoked by the sale of the house and lot. *Gilbert v. Gilbert*, 9 Barb. 532; *Vandemark v. Vandemark*, 26 Barb. 416; *Philson v. Moore*, 23 Hun, 152. "If a testator devises real property, and sells the same before the will takes effect, the proceeds of the sale will become personalty, and no court can substitute the money received by the testator for the land devised." *Ametrano v. Downs*, 170 N. Y. 388.

Q. A devises a certain house to B, and thereafter sells the same to C, taking back a purchase money mortgage for \$5,000. At A's death, B claims the amount of the mortgage. What are his rights?

A. B has no right to the mortgage. "Where a lot is specifically devised, and afterwards sold by the testator to a third party, the sale operates quoad hoc as a revocation of the gift, and the devisee acquires no interest in a mortgage given to secure the whole or any portion of the purchase money." *McNaughton v. McNaughton*, 34 N. Y. 201.

Q. A makes a will and places it among his papers. After his death, although diligent search is made, the will cannot be found. The executor named therein attempts to prove the contents thereof as a lost will. What presumption, if any, is there?

A. Where a will previously executed cannot be found after the death of the testator, it having remained in his custody during his lifetime, there is a strong presumption that it was destroyed by him *animo revocandi*. *Collyer v. Collyer*, 110 N. Y. 481; *Matter of Kennedy*, 167 N. Y. 163. "If the will had remained in the custody of the testator, or it had appeared

after its execution, he had had access to it, the presumption of law would be, from the fact that it could not be found, after his decease, that the same had been destroyed by him *animo revocandi*. But that presumption is entirely overcome and rebutted, when it appears, as it did in the present case, that, upon the execution of the will, it was deposited by the testator with the custodian, and that the testator did not thereafter have it in his possession or have access to it." *Schultz v. Schultz*, 35 N. Y. 653.

Q. A makes a will in 1914, and in 1915 makes a second will, which by its terms expressly revokes the former. At the death of A, the will of 1915 cannot be found, and the beneficiaries of the will of 1914 attempt to have the will of 1914 admitted to probate. Should probate be allowed?

A. No. Where a will is revoked by the execution of a second will, which provides that all previous wills of the testator are thereby revoked, the first will not be revived by the fact that after the testator's death, the second will cannot be found. In *re Forbes's Will*, 24 N. Y. Suppl. 841; *Matter of Barnes*, 70 App. Div. 523. Section 41 of Decedent Estate Law re-enacts the above rule, and is as follows: "If, after the making of any will, the testator shall duly make and execute a second will, the destruction, canceling or revocation of such second will, shall not revive the first will, unless it appear by the terms of such revocation, that it was his intention to revive and give effect to his first will; or unless after such destruction, canceling or revocation, he shall duly republish his first will."

(NOTE.) A will that has been revoked by a later one which was destroyed by the testator, will not be revived by his statement that he desires his first will to stand, made to others than the subscribing witnesses, and where the persons to whom such statement was made, did not subscribe as witnesses to the will. Republication requires the same formalities as publication itself; therefore a will which has been revoked can be revived only by its republication in the presence of its attesting witnesses. *Matter of Stickney*, 161 N. Y. 42; *Matter of Cunnion*, 201 N. Y. 123.

Q. A, whose estate amounts to \$100,000, leaves \$60,000 to Hobart Literary Society, and the rest of his property to his

children. The children attack the bequest to the society. Is the bequest good? How far good, if good at all?

A. The bequest to the society is good for \$50,000, being one-half of the estate of A, according to sec. 17 of Decedent Estate Law, which is as follows: "No person having a husband, wife, child or parent, shall by his or her last will and testament, devise or bequeath to any benevolent, charitable, literary, scientific, religious or missionary society, association or corporation, in trust or otherwise, more than one-half part of his or her estate, after payment of his or her debts, and such devise or bequest shall be valid to the extent of one-half, and no more." *Chamberlain v. Taylor*, 105 N. Y. 185; *Garvey v. Union Trust Co.*, 29 App. Div. 513.

Q. A man and his wife make a joint will, each devising their entire estate to the other. Is it valid? If so, what is the effect after the death of one party?

A. The will is valid. "A mutual will executed by husband and wife, devising reciprocally to each other, is valid. Such an instrument operates as a separate will of whichever dies first." *Matter of Dietz*, 50 N. Y. 88.

Q. A devises certain property to his son B. B dies before the testator, leaving a son, C, surviving. Thereafter A dies. C and the next of kin of A both claim the property. Who is entitled to it?

A. C gets the property, as the devise does not lapse. It would have been otherwise if A had left the property to a stranger, but not to his son. Section 29 of Decedent Estate Law, covering this case, provides as follows: "Whenever any estate, real or personal, shall be devised or bequeathed to a child or other descendant of the testator, or to a brother or sister of the testator, and such legatee or devisee shall die during the lifetime of the testator, leaving a child or other descendant who shall survive such testator, such devise or legacy shall not lapse, but the property so devised or bequeathed

shall vest in the surviving child or other descendant of the legatee or devisee, as if such legatee or devisee had survived the testator and had died intestate."

(NOTE.) This provision applies only to descendants, and a widow of a deceased son does not take. *Cook v. Munn*, 12 Abb. N. C. 344.

Q. A devises his house and lot and \$10,000 to B. He leaves all the rest, residue and remainder of his estate to C. B dies before A, the testator. At A's death, the executors claim B's devise. C also claims it, and D claims it as next of kin of B. B was no relative of the testator. How is the estate to be divided?

A. C gets all the estate, both real and personal, the devise and bequest to B having lapsed by his death, he being no relative of the testator. "The common-law rule that lapsed devises do not fall into the residue, but go to the heirs as undisposed of by the will, was done away with by the statute, and there is now no difference between lapsed devises and lapsed legacies, as it respects the operation upon them of a general residuary clause." *Cruikshank v. Home for the Friendless*, 113 N. Y. 358. The rule now, therefore, is that both lapsed legacies and devises go to the residuary devisee and legatee. *Matter of Ollen*, 151 N. Y. 243; *Moffett v. Elmendorf*, 152 N. Y. 485; *Gallavan v. Gallavan*, 57 App. Div. 32.

Q. A father by his will gives a legacy to each of his two children, B and C, on condition that the same shall be void if they contest his will. They both contest, B being of full age, and C a minor by her guardian. What is the effect of the contest by both? Is the provision in the will valid?

A. The provision in the will is valid as to the adult, but invalid as to the minor, and the effect would be to forfeit B's legacy. As to the minor, the condition was void as against public policy; it is, however, a valid provision as to the one of full age. The testator having a right to say to whom his property shall be bequeathed and devised, has also the right to

attach a condition to any gift that the recipient thereof shall not contest the probate of the will. *Bryant v. Thompson*, 59 Hun, 549, appeal dismissed in 128 N. Y. 426; *Matter of Vandevort*, 62 Hun, 612; *Matter of Barandon*, 41 Misc. 380. In *re Kathan's Will*, 141 N. Y. Suppl. 705, it was said: "A testator may limit a devise or bequest upon any condition that is lawful. While a testator may limit a devise upon any condition that is lawful, a condition that a devisee shall dispute no part of the will is not lawful, where used to sustain illegal devises or bequests, and so cannot be enforced."

Q. A dies leaving a will devising and bequeathing all his property to a cousin B. He expressly states in his will "that it is my desire and wish that my son C, on account of his bad treatment of me, shall not get any of my property." B dies before A. Both C and the heirs of B claim the property. To whom should it go?

A. C gets it all, the devise and bequest to B having lapsed, and no disposition having been made as to who should get the property, in case B did not survive the testator, and although A expressly wished that his son should not get any of his property, C takes all. "In case a testator fails to make a legal devise of his realty, or having legally devised it the devise fails for any cause, the heir will inherit, notwithstanding that there is an express provision in the will that he should not take any part of the estate. There must be a legal devise to cut off the right of the heir to inherit; mere words of disinheritance are insufficient to effect that purpose." *Gallagher v. Crooks*, 132 N. Y. 338. See also *Herzog v. T. G. & T. Co.*, 177 N. Y. 98; *Pomroy v. Hincks*, 180 N. Y. 75.

Q. A by his will devised certain real estate to his wife for her life, and "from and immediately after her death," to be divided equally among his children. At his death A left surviving D, his widow, and B and C, two daughters, who were his only heirs at law. What estate did B and C take under their father's will in the real estate so devised by him? Did the

estate of the children depend upon their surviving their mother?

A. The widow takes a life estate, and the children a vested remainder. Their title does not depend on their surviving their mother. The words "from and immediately after her death," do not operate to postpone the vesting of the remainder in the children until the death of the mother (the life tenant) but simply denote the period when they would become entitled to the estate in possession. *Taggart v. Murray*, 53 N. Y. 233; *Ackerman v. Gorton*, 67 N. Y. 63. "The words 'from and after' used in a testamentary gift of a remainder, following a life estate, do not afford sufficient ground in themselves for adjudging that the remainder is contingent and not vested, and unless their meaning is enlarged by the context, they are to be regarded as defining the time of enjoyment simply and not of the vesting of the title. The presumption is that a testator intends that his dispositions shall take effect in enjoyment or interest at the date of his death, and upon the happening of the event, unless the language of the will by fair construction makes his gifts contingent, they will be regarded as vested. Words of survivorship or gifts over on the death of the primary beneficiary are to be construed unless a contrary intention appears, as relating to the death of the testator." *Nelson v. Russell*, 135 N. Y. 137. The law favors the vesting of estates and favors such a construction of a will as will avoid the disinheritance of remainder-men who may happen to die before the determination of the precedent estate. *Stokes v. Weston*, 142 N. Y. 433; *Matter of Brown*, 154 N. Y. 313; *Connely v. O'Brien*, 166 N. Y. 408.

Q. A dies leaving a will, but naming no executor therein. Is the will valid? How would it be carried into effect, if valid?

A. The will is valid, and will be carried into effect by the appointment of an administrator with the will annexed, according to sec. 2643 of the Code of Civ. Pro.

Q. A makes a will appointing an executor therein. A dies, and the executor refuses to act. What should be done?

A. Application should be made for the appointment of an administrator with the will annexed. Section 2643 of the Code of Civ. Pro.

Q. The executor of a will in the state of New Jersey discovers personal property in this state belonging to the testator. He comes to you for advice. What would you advise him?

A. He should apply for ancillary letters testamentary, according to secs. 2695 to 2702 of the Code of Civ. Pro., inclusive.

Q. Testator appoints B as his executor, "granting to said executor and his successor full power to sell real estate." B refuses to qualify, and an administrator with the will annexed is appointed. Can he sell the real estate?

A. Yes. He has the same power as the executor would have had, and all sales made by him are equally valid as if made by the executor named in the will. Section 2642 of the Code of Civ. Pro.

Q. A dies intestate leaving mortgaged realty. B is the only heir at law. B demands that the administrator pay off the mortgage. What are his rights? State the rule.

A. The administrator cannot be compelled to pay off the mortgage, according to sec. 250 of the Real Property Law (Consolidated Laws, chap. 50), which is as follows: "Where real property subject to a mortgage executed by any ancestor or testator descends to an heir, or passes to a devisee, such heir or devisee must satisfy and discharge the mortgage out of his own property, without resorting to the executor or administrator of his ancestor or testator, unless there be an express direction in the will of such testator, that such mortgage be otherwise paid."

Q. A, by his last will, directed his executor to continue his business for two years after his death. At that time his general estate was valued at \$50,000, of which \$10,000 was invested in

the business. The executor continued the business according to the direction in the will. At the end of the two-year period, it was found that the assets of the concern had increased from \$10,000 to \$15,000, and its debts to \$30,000. The business creditors to whom the increased debts are due claim recourse against the general assets of the estate for the debts contracted by the executor after A's death. What are the rights of the parties?

A. The claim of the business creditors must be confined to the fund invested in the business, and cannot be allowed against the general assets of the estate, as even though the executor is expressly directed and authorized to continue the business, he cannot bind the general assets unless specially authorized to do so. "A power, simpliciter, to carry on the testator's trade, without anything more, will be construed as an authority simply to carry on the trade or business with the fund already invested in it at the time of the testator's death, and to subject that fund only to the hazards of the trade and not the general assets of the estate. The property already embarked in the business is the trade fund, unless it appears from the will that the executor was authorized to use the general assets of the estate." *Willis v. Sharp*, 113 N. Y. 590. See also *Columbus Watch Co. v. Hodenpyl*, 135 N. Y. 430.

Q. A died leaving a will bequeathing to his nephew X a legacy of \$5,000 and directed his executor to pay said legacy of \$5,000 within one year after his (A's) death. A also devised and bequeathed the remainder of his estate to Y and appointed him the sole executor of his estate. Y duly qualified as executor, accepted and took possession of the property so devised and bequeathed. A's estate consisted mostly of real estate, there being just enough personalty to pay his funeral expenses and debts. X demanded that Y pay him his legacy, which Y refused to do claiming that it was payable out of the personal estate, and as there was not sufficient personal property out of which to pay it, he was not liable. What are X's rights and remedies?

A. The payment of such a legacy can be enforced by a suit in equity against the real estate, or by an action against the devisee upon his promise to pay implied by his acceptance of the devise. The rule is well settled that when a legacy is directed to be paid by the person to whom real estate is devised, such real estate becomes charged with the payment of the legacy. And this rule applies as well when the legacy is directed to be paid by the executor who is also the devisee of the real estate. The devisee by accepting the devise, becomes personally liable to pay the amount of the legacy. If he desires to escape responsibility he must refuse to accept the devise. *Glen v. Fisher*, 6 Johns. Ch. 33; *Reynolds v. Reynolds*, 16 N. Y. 257; *Gridley v. Gridley*, 24 N. Y. 130; *Brown v. Knapp*, 79 N. Y. 143; *Converse v. Converse*, 73 Misc. 622; *Dinau v. Conys*, 143 N. Y. 457.

Q. The will of A gives the legal title to all his property, both real and personal, to different devisees and legatees, but there is an obscurity as to the identity of some of the parties intended to take the real estate. B, who claims to be one of the devisees, commences an action for the judicial construction of the will, making the other devisees and legatees defendants. The executor and the other beneficiaries demur on the ground that the facts do not constitute a sufficient cause of action. Is the demurrer good?

A. The demurrer is good. The proper action to be brought, is an action by the alleged devisee to recover the devise which he claims. This action should be brought as a legatee or devisee against the executor, according to sec. 1819 of the Code of Civ. Pro.

Q. It is provided in the will of A that his personal property should be distributed amongst his next of kin, according to the statute providing therefor. He leaves a widow, two nephews and a niece. The widow claims one-third as her share. What are her rights? How should the property be divided?

A. The widow gets nothing; the property must be divided

equally among the nephews and the niece. "A provision in a will directing generally that the personal property of the testator shall be distributed as provided by statute in case of intestacy, where the testator leaves a widow, will entitle her to be included in the distribution, although not specially mentioned, but when the distribution is by the terms of the will confined to the next of kin, the reference to the statute simply gives the rule of distribution among the next of kin, as if there is no widow, and she is not included." *Luce v. Dunham*, 69 N. Y. 36. See also *Murdock v. Ward*, 67 N. Y. 387; *Keteltas v. Keteltas*, 72 N. Y. 312; *Tilman v. Davis*, 95 N. Y. 17; *Matter of Devoe*, 171 N. Y. 281.

Q. A by will devises to his executors in trust, a certain piece of real estate with instructions to sell it immediately after his death, and divide the proceeds between his sons, B and C. A few days after his death, and before the sale of the real estate, B dies leaving a wife and son surviving. How would the property descend? Give the rule governing such a state of facts.

A. This is a case of equitable conversion, and the property must be divided as personal property, C receiving one-half, and the other half being divided between B's wife and son, the wife receiving one-third and the son two-thirds, according to sec. 98 of Decedent Estate Law, which in part is as follows: "If the deceased died intestate, the surplus of his personal property after payment of debts; and if he left a will, such surplus, after payment of debts and legacies, if not bequeathed, must be distributed to his widow, children, or next of kin, in the manner following: 1. One-third part to the widow, and the residue in equal portions among the children, and such persons as legally represent the children if any of them have died before the deceased."

Q. A, the wife of B, obtains a divorce from him for his misconduct. B subsequently dies leaving \$5,000 in personal property. A claims a distributive share of the property. What are her rights?

A. She is not entitled to any share of his personal property, as she is no longer his wife. "A divorced wife, whether the divorce was granted because of misconduct of herself or her husband, is not entitled, if he die intestate, to administration or to a distributive share of his personal estate." *Matter of Ensign*, 103 N. Y. 234. See also *Van Cleef v. Burns*, 118 N. Y. 549; *Livingston v. Livingston*, 173 N. Y. 381; *Matter of Merritt*, 155 App. Div. 231.

Q. A dies, devising his entire property to his only son X, and appointing his father, X's grandfather, the general guardian. A's widow consults you as to her rights. Advise her.

A. She has the right of dower in A's realty; he could not cut this off by will. He had full power, however, to bequeath his personalty, and therefore she has no rights in the personal property.

Q. A died leaving him surviving five children of a son, and one son of a deceased daughter, his only heirs at law. How is A's property distributed among the grandchildren?

A. Both real and personal property would be divided equally among them. Section 82 of Decedent Estate Law, states the rule as to the real property, and is as follows: "If the intestate leave descendants in the direct line of lineal descent, all of equal degree of consanguinity to him, the inheritance shall descend to them in equal parts however remote from him the common degree of consanguinity may be." Section 98, par. 10, of Decedent Estate Law, governs the distribution of the personal property, and is as follows: "Where the descendants, or next of kin of the deceased, entitled to share in his estate, are all in equal degree to the deceased, their shares shall be equal."

Q. A dies intestate, leaving him surviving a son and two grandchildren, the children of a deceased daughter. What respective shares have each of them in the real and personal property of A?

A. The son is entitled to one-half, and grandchildren receive the share of their mother, which is one-half, to be divided between them. Section 83 of Decedent Estate Law, governs the distribution of the real property, and is as follows: "If any of the descendants of such intestate be living, and any be dead, the inheritance shall descend to the living, and the descendants of the dead, so that each living descendant shall inherit such share as would have descended to him had all the descendants in the same degree of consanguinity who shall have died leaving issue been living; and so that issue of the descendants who shall have died shall respectively take the shares which their ancestors would have received." Section 98, par. 11, of Decedent Estate Law, as to the personalty, is as follows: "When such descendants or next of kin are of unequal degrees of kindred, the surplus shall be apportioned among those entitled thereto, according to their respective stocks; so that those who take in their own right shall receive equal shares, and those who take by representation shall receive the share to which the parent whom they represent, if living, would have been entitled."

Q. A makes a will leaving one-third of his realty to his wife, and the rest, residue and remainder to be divided equally between the sons, C, who is unmarried, and B who is married. A dies, and one hour after the probate of his will, his son B dies. B leaves no children. The property consists of \$30,000 in money, and 400 acres of land. How should this be divided?

A. The personal property not being mentioned in the will, A must be deemed to have died intestate as to that, and therefore the personal property must be distributed according to the Statute of Distribution. A's widow would get one-third, C would also get one-third, B's one-third would be divided between his widow, his mother, and C, the widow receiving one-half, and the mother and C dividing the other half equally between them. Section 98, par. 2, of Decedent Estate Law, provides as follows: "If there be no children, nor any legal representatives of them, then one-half of the whole surplus shall be allotted to

the widow, and the other half distributed to the next of kin of the deceased, entitled under the provisions of this section." Paragraph 6 is as follows: "If the deceased leave no children and no representatives of them, and no father, and leave a widow and a mother, the half not distributed to the widow shall be distributed in equal shares to his mother and brothers and sisters, or the representatives of such brothers and sisters; and if there be no widow, the whole surplus shall be distributed in like manner to the mother, and to the brothers and sisters, or the representatives of such brothers and sisters." The real property would be distributed in the following manner: Assuming the provision to be in lieu of dower, the widow will get one-third, C will also get one-third, and B's one-third will be divided as follows: B's widow will get dower, a life estate in one-third of B's share, and the remainder of B's share will be divided as follows: To the mother for life, remainder in fee to C. This last is according to sec. 85 of Decedent Estate Law, which is as follows: "If the intestate die without descendants and leave no father, or leave a father not entitled to take the inheritance under the last section, and leave a mother, and a brother or sister, or the descendant of a brother or sister, the inheritance shall descend to the mother for life, and the reversion to such brothers and sisters of the intestate as may be living, and the descendants of such as may be dead, according to the same law of inheritance hereinafter provided. If the intestate in such case leave no brother or sister or descendant thereof, the inheritance shall descend to the mother in fee."

Q. A dies intestate, leaving \$4,000 in personal property. He leaves him surviving a widow and two brothers, but no children. How should the property be distributed?

A. The widow is entitled to the whole \$4,000, according to sec. 98, par. 3, of Decedent Estate Law, which is as follows: "If the deceased leaves a widow, and no descendant, parent, brother or sister, nephew or niece, the widow shall be entitled to the whole surplus; but if there be a brother or sister, nephew or niece, and no descendant or parent, the widow shall be en-

titled to one-half of the surplus as above provided, and to the whole of the residue if it does not exceed two thousand dollars; *if the residue exceeds that sum, she shall receive in addition to the one-half, two thousand dollars*; and the remainder shall be distributed to the brothers and sisters and their representatives." Matter of Hardin, 97 App. Div. 493.

Q. A, an unmarried female, dies leaving certain real estate, which she acquired through her own industry. She made no will. She left her surviving a father and two brothers. How should the property be divided?

A. The father alone takes the property in fee. As it did not come to the intestate on the part of the mother, but was acquired by her own industry, the brothers have no right thereto. This case is governed by sec. 84 of Decedent Estate Law, which is as follows: "If the intestate die without lawful descendants, and leave a father, the inheritance shall go to such father, unless the inheritance came to the intestate on the part of his mother, and she be living; if she be dead, the inheritance descending on her part shall go to the father for life, and the reversion to the brothers and sisters of the intestate and their descendants, according to the law of inheritance by collateral relatives hereinafter provided; if there be no such brothers or sisters or their descendants living, such inheritance shall descend to the father in fee."

Q. A dies intestate, leaving him surviving a father and a widow but no children. His personal property amounts to \$10,000. How should the same be distributed?

A. The widow and father each got one-half according to sec. 98, par. 7, of Decedent Estate Law, which is as follows: "If the deceased leave a father and no child or descendant, the father shall take one-half if there be a widow, and the whole, if there be no widow."

Q. A, the wife of B, dies intestate, leaving her husband and

a child surviving. Her personal property amounts to \$50,000. What are the rights of the husband and the child?

A. The husband is entitled to one-third, and the child to two-thirds of the property, according to sec. 100 of Decedent Estate Law, which is as follows: "The provisions of this article respecting the distribution of property of deceased persons apply to the personal property of married women dying, leaving descendants them surviving. The husband of any such deceased married woman shall be entitled to the same distributive share in the personal property of his wife to which a widow is entitled in the personal property of her husband by the provisions of this article and no more."

Q. A, a married woman, dies intestate, leaving \$50,000 in personal property. She leaves no descendants, but leaves a brother, a sister and a husband. How should the property be distributed?

A. The husband takes all. As there are no descendants, and no provision being made by statute for a case like this, the inheritance must descend according to the rule of the common law. "Where a married woman possessed of a separate personal estate, dies without having made any disposition of it in her lifetime, or by way of testamentary appointment, the title thereto vests in her surviving husband, and cannot be affected by the granting of administration upon her estate to anyone else." *Robbins v. McClure*, 100 N. Y. 328. See also *Matter of Bolton*, 159 N. Y. 133; *Matter of Nones*, 27 Misc. 165; *Matter of McLeod*, 32 Misc. 229; *Matter of Thomas*, 33 Misc. 729.

Q. A and B who each own a dwelling house in the City of New York, exchange their property by mutual deeds, in which their wives do not join. A died intestate, and his wife claims dower in both pieces of property. What are her rights and remedies?

A. A's widow is put to her election as to which parcel she will take dower in, and must bring an action in one year from A's death to recover dower from the parcel given in exchange, otherwise she will be deemed to have chosen to take dower of the parcel received in exchange. *Wilcox v. Randall*, 7 Barb. 633; *Runyan v. Steuart*, 12 Barb. 537. Section 191 of the Real Property Law (Consolidated Laws, chap. 50) provides for this as follows: "If a husband seized of an estate of inheritance in lands, exchanges them for other lands, his widow shall not have dower of both, but she must make her election, to be endowed of the lands given, or of those taken, in exchange; and if her election be not evinced by the commencement of an action to recover her dower of the lands given in exchange, within one year after the death of her husband, she is deemed to have elected to take her dower of the lands received in exchange."

Q. A dies possessed of \$50,000 in real property. He left a will by which he directed his executor to give to his wife \$5,000, and also certain other devises to B and C. The widow claims dower and also the \$5,000. B and C claim that the wife is only entitled to dower or \$5,000 and that she should make an election which she should take. What do you say?

A. The widow is entitled to dower and also the bequest of \$5,000, as there is nothing inconsistent in the provision to put the widow to an election which one to take. "There can be no controversy as to the general principle governing the question of election between dower and a provision in the will. Dower is favored. It is never excluded by a provision for a wife, except by express words or necessary implication. Where there are no express words there must be upon the face of the will a demonstration of the intention of the testator that the widow shall not take both dower and the provision. The will furnishes this demonstration only when it clearly appears without ambiguity or doubt, that to permit the widow to claim both dower and the provision would interfere with the other dispositions and disturb the scheme of the testator as manifested by his will. The

intention of the testator to put the widow to an election cannot be implied from the extent of the provision, or because she is a devisee under the will for life or in fee, or because it may seem to the court that to permit the widow to claim both the provision and dower would be unjust as a family arrangement, or because it may be inferred or believed, in view of all the circumstances, that if the attention of the testator had been drawn to the subject he would have expressly excluded dower. We repeat, the only sufficient and adequate demonstration which, in the absence of express words, will put the widow to her election, is a clear incompatibility, arising on the face of the will, between a claim of dower and a claim to the benefit given by the will." *Andrews, J., in Konvalinka v. Schlegel*, 104 N. Y. 125, followed in *Asche v. Asche*, 113 N. Y. 232; *Closs v. Eldert*, 30 App. Div. 338; *Matter of Gorden*, 172 N. Y. 25.

Q. A is an adopted child of B. B dies leaving a widow and A surviving. His property consists of \$20,000 in personal property. How should the same be distributed?

A. The widow gets one-third and A, the adopted child, gets two-thirds. The adopted child is entitled to share in the estate of the foster parent as though he were the natural child of such foster parent. This is provided for in sec. 114 of Domestic Relations Law (Consolidated Laws, chap. 14). *U. S. Trust Co. v. Hoyt*, 150 App. Div. 621; *Carpenter v. Buffalo Co.*, 155 App. Div. 655.

(NOTE.) "Heirs of an adopted child have the same legal relationship to foster parents, as the heirs of a child by nature." *Matter of Cook*, 187 N. Y. 253.

Q. A, an infant, whose father and mother were living, was adopted by B. The natural father of A died intestate leaving \$20,000 in cash. Can A share in the distribution of this money?

A. Yes. A did not lose his right of inheritance from his natural parents, even though he was adopted by another. Section 114 of the Domestic Relations Law so provides.

Theobald v. Smith, 103 App. Div. 200; Gilliam v. Guarantee Trust Co., 186 N. Y. 127; Matter of MacRae, 189 N. Y. 142.

Q. A had one child, B, a son, and thereafter duly adopted C, a girl of the age of fifteen years. A made his will giving all his property to his heirs to be divided equally. A died and on the probate of his will, C, the adopted child, claims one-half of the estate. What are her rights?

A. C, the adopted child, is entitled to share in the estate equally with B, the natural son. (Section 114 of Domestic Relations Law.) A child adopted under the statute is given all the rights of any other child or heirs. Matter of Gregory, 15 Misc. 407; Dodin v. Dodin, 16 App. Div. 42.

(NOTE.) "A child adopted under the statute by a husband and wife, after policies of insurance have been issued upon the life of the husband payable to the wife, and in case of her death to her children, is entitled upon the wife's failure to survive, to share in the proceeds of the policies with the natural children." Von Beck v. Thomsen, 44 App. Div. 373, aff'd in 167 N. Y. 601. "A limitation in a deed or will conditioned upon the survivorship of a child or children is not deemed to include an adopted child where the grantor or testator is a stranger to the adoption. And upon the death of the foster parent without heirs, the adopted child is not deemed to be the child of such foster parent, so as to defeat the rights of the remainder-man." Matter of Leack, 197 N. Y. 193.

Q. A is the mother of B, an illegitimate son. B dies leaving no descendants him surviving. His property amounts to \$10,000. Who is entitled to it? Suppose the mother died leaving no lawful issue, but B, who would be entitled to her property?

A. The mother of an illegitimate child, in the absence of the illegitimate child dying without lawful issue, is entitled to said illegitimate child's property. The illegitimate child is entitled to his mother's property when she dies without lawful issue. This is provided for in sec. 89 of Decedent Estate Law, as

follows: "If an intestate who shall have been illegitimate die without lawful issue, or illegitimate issue entitled to take, under this section, the inheritance shall descend to his mother; if she be dead, to his relatives on her part, as if he had been legitimate. If a woman die without lawful issue, leaving an illegitimate child, the inheritance shall descend to him as if he were legitimate. In any other case illegitimate children or relatives shall not inherit." *Kiah v. Grenier*, 56 N. Y. 220.

Q. A dies leaving a will giving to each of his children a legacy of \$5,000. There are three children and two children of a deceased son, B. The deceased son died before the making of the will. The children of B claim the legacy of \$5,000. Are they entitled to it?

A. No. Here the bequest was to the children of the testator, and does not come under the rule of lapsed legacies. The intention of the testator was to give to his children then living, those who were living at the time of his making the will. As B died before the making of the will, it was clearly the intention of the testator not to give to B's descendants any share of his estate. *Pimel v. Betjemann*, 183 N. Y. 194; *Matter of Turner*, 208 N. Y. 261.

Q. A made his will devising all his real estate to the children of his daughters, B and C, to be divided equally between them, as they respectively arrive at the age of twenty-one years. B and C each have three children living at the death of A, and after his death, C gives birth to two other children. What are the rights of the grandchildren of A?

A. The grandchildren living at the death of A take the entire estate to the exclusion of those born after his death. In *Double-day v. Newton*, 27 Barb. 432, a case exactly in point, it was held: "That the will vested in the devisees a present estate in fee in the premises. That there was neither in fact nor in law any suspension of division. That if there was a suspension of division, such suspension did not prevent alienation nor avoid

the will. That the estate, under the will, vested immediately on the death of the testator, and that only those grandchildren in being at his death took an interest in the estate." So also *Moultrie v. Hunt*, 23 N. Y. 394; *St. John v. Andrews Inst.*, 117 App. Div. 712.

PLEADING, PRACTICE AND EVIDENCE

CHAPTER XX

Code Pleading and Practice

Q. Draw a summons in a divorce case.

A. Supreme Court,
New York County.

JOHN BROWN, <i>Plaintiff,</i> <i>against</i> MARY BROWN, <i>Defendant.</i>
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SUMMONS.
ACTION FOR A DIVORCE.

To the above named defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear or answer, judgment will be taken against you by default, for the relief demanded in the complaint.

Dated, New York, May 1, 1915.

JOSEPH STORY, Plaintiff's Attorney,
Office and post-office address, No. 50 Wall St.,
Borough of Manhattan, New York City.

The special requirement in divorce cases, as to the form of the summons, is found in sec. 1774 of the Code of Civ. Pro. It is there provided that final judgment shall not be rendered in favor of the plaintiff upon the defendant's default in appearing or pleading, unless the copy of the summons served contains legibly written or printed upon the face thereof, "Action to Annul a Marriage;" "Action for a Divorce;" "Action for a Separation," as the case may be.

Q. Your client desires you to bring an action in the Supreme court against B to collect \$1,000 for money loaned; no defense being anticipated, you wish to dispense with a complaint. Draw the necessary papers to be served upon B to enable you to take judgment by default, in the absence of such complaint, without application to the court.

A. The proper paper to be drawn in this case would be a summons with notice. It is provided in secs. 419 and 420 of the Code of Civ. Pro. that in an action to recover a liquidated amount, judgment may be entered by the clerk without application to the court, where a copy of the complaint is served with the summons, or a notice is served with the summons stating that judgment will be taken against the defendant by default for a certain specified sum if he fails to appear or answer. The form of the summons is the same as in the preceding answer, omitting of course the words "Action for a Divorce." The following is the form of notice generally used:

NOTICE. Take notice, that upon your default to appear or answer the above summons, judgment will be taken against you for the sum of \$1,000, with interest from January 1, 1915, and with costs of this action.

JOSEPH STORY,
Plaintiff's Attorney.

Q. Draw an affidavit of the service of a summons.

A. Supreme Court,
New York County.

JOHN BROWN, <i>Plaintiff</i> , <i>against</i> THOMAS JONES, <i>Defendant</i> .
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CITY AND COUNTY OF NEW YORK, ss.

Peter Smith, being duly sworn, deposes and says that he is nineteen years of age; that on the 10th day of May, 1915, at No. 320 Broadway, in the City of New York, he served the

annexed summons on Thomas Jones, the defendant herein, by delivering a copy to him personally, and leaving the same with him. Deponent further says that he knew the person so served, to be the same person mentioned and described in said summons as the defendant in this action.

PETER SMITH.

Sworn to before me this
10th day of May, 1915.

ROBERT GREEN,
Notary Public,
New York County.

The summons may be served by any person of the age of eighteen years or upwards other than a party to the action. See sec. 425 of the Code of Civ. Pro.

Q. While A, a resident of the state of Ohio, was in attendance at court as defendant in an action then being tried in the City of Buffalo, plaintiff caused a summons in another action to be served upon him. A, not wanting any more litigation outside of his own state, consults you. What would you advise, and what steps would you take, if any, to afford him relief?

A. The service is bad, and will be set aside upon motion. A nonresident party is exempt from service of process while actually attending court here as a party. In making the motion to set the service aside, care should be taken to appear specially for the purpose of the motion. *Matthews v. Tufts*, 87 N. Y. 568; *Parker v. Marko*, 136 N. Y. 585.

Q. A is a resident of a foreign country who attended as a witness in obedience to a subpoena issued from the supreme court of New York County, in an action there on trial. Before he was sworn as a witness, a summons was served upon him in a suit wherein B, a resident of New York County, was plaintiff. A immediately caused a notice of appearance in the action to be served by C, a New York attorney. Was the service regular? What was the effect of the notice of appearance?

A. The service was irregular, but the notice of appearance cured the irregularity, and gave the court jurisdiction. The defendant by appearing generally in the action is deemed to have waived any defect in the service of the summons. The defendant's attorney should have appeared specially for the purpose of making a motion to set the service aside. "A resident of a foreign state, while attending the courts of this state as a witness, cannot be served with a process for the commencement of a civil action against him." *Person v. Grier*, 66 N. Y. 124. "While a person attending court as a witness is privileged from service, such privilege will be waived by a general appearance in the action." *Chadwick v. Chase*, 5 Weekly Dig. 589. See also *Mack v. Amer. Ex. Co.*, 20 Misc. 215; sec. 424 of Code of Civ. Pro.

(NOTE.) "A resident witness is, while attending examination, exempt from arrest, but not from the service of process. A different rule applies to non-resident witnesses." *Frisbie v. Young*, 11 Hun, 474. "Where a nonresident comes into this state for the sole purpose of being sworn as a witness, the privilege of exemption from the service of civil process is extended to him, not merely for his own convenience, but also to enable the courts to properly transact their business. If, however, he comes for the double purpose of attending court and attending to business having no connection with the trial, the privilege does not attach to him. The presumption is that the service is regular." *Finucane v. Warner*, 194 N. Y. 160.

Q. In an action where A was defendant, and B plaintiff, the original summons was entitled in the City Court, but the summons delivered to A was entitled in the Supreme Court. Which court has jurisdiction?

A. The supreme court has jurisdiction. A party may always treat a paper served upon him as a true copy of the original, and act accordingly; therefore as the copy here was entitled in the Supreme Court, that court has jurisdiction. *Bailey v. Sargent Co.*, 23 Civ. Pro. Rep. 319.

Q. In a case where you get an order for the service of the summons on a defendant by publication, and thereafter serve him personally without the state, when does his time to answer expire?

A. The defendant's time to answer expires sixty-two days after personal service upon him outside the state. "Under the provisions of the Code in reference to the service of a summons by publication, such service is not complete until the expiration of at least six weeks from the time of the first publication, or when service is made out of the state, until the expiration of that period after such service." *Market Nat. Bank v. Pacific Nat. Bank*, 39 N. Y. 397. See also *Waters v. Waters*, 27 N. Y. Suppl. 1004. For service by publication, see secs. 438 to 445 of the Code, inclusive.

Q. A brings an action against B whom he knows to be a resident of New Haven, Conn., and obtains an order for substituted service of the summons upon B. Is the service good?

A. No. Substituted service of the summons can only be made upon a defendant who is a resident of the state, according to sec. 435 of the Code. *Collins v. Campfield*, 9 How. Pr. 519; *Lynch v. Eustis*, 85 N. Y. Suppl. 1063.

Q. The time in which to commence an action is about to expire, and you cannot personally serve the defendant until two weeks, when your time will have expired. What proceeding would you take in order to get the action under way?

A. Get an order for the service of the summons by publication, or deliver the summons to the sheriff to be served. The provision as to publication is to be found in sec. 438, par. 6, of the Code, which is as follows: "An order directing the service of a summons upon the defendant, without the state, or by publication, may be made in either of the following cases: 6. Where the defendant is a resident of the state or a domestic corporation; and an attempt was made to commence the action against the defendant, . . . and the limitation would have expired, within sixty days next preceding the application, if the time had not been extended by the attempt to commence the action." Section 399 of the Code provides for the service by the sheriff in such a case.

Q. A rents a house situated at No. 50 Grand Street, New York City, for one year, at the monthly rental of \$100, commencing May 1, 1914. A fails to pay his rent for the months of May, June and July, 1914. Draw a complaint in the supreme court to recover the rent, omitting verification.

A. Supreme Court,
New York County.

B, *Plaintiff,*
 against
A, *Defendant.*

B, plaintiff in the above entitled action, by Joseph Story, his attorney, complains of the defendant and alleges:

1. That heretofore and on or about May 1, 1914, the plaintiff leased to the defendant certain premises known as No. 50 Grand Street, in the City of New York for one year, beginning with the said May 1, 1914, at a monthly rental of \$100, payable in advance, which sum defendant agreed to pay.

2. That said defendant has not paid said rental for the months beginning May 1, June 1 and July 1, 1914, the same amounting to the sum of \$300.

3. That plaintiff has demanded said sum from the defendant, but the defendant has not paid the same nor any part thereof.

4. That there is now due and owing to the plaintiff from the defendant the said sum of \$300, with interest on \$100 from May 1, 1914, and on \$100 from June 1, 1914, and on \$100 from July 1, 1914.

Wherefore plaintiff demands judgment against the defendant for the said sum of \$300 with interest as aforesaid, together with the costs of this action.

JOSEPH STORY,
Plaintiff's Attorney,
50 Wall Street,
New York City.

Q. Draw a complaint which will hold good against the maker and three indorsers of a promissory note.

A. Supreme Court,
New York County.

JOHN BROWN, *Plaintiff*,
 against
THOMAS JONES, DAVID ROE,
RICHARD SMITH AND WM.
BLACK, *Defendants*.

See secs. 454 and 534, Code of
Civ. Pro.

John Brown, the plaintiff in the above entitled action, by Joseph Story, his attorney, complains of the defendants and alleges:

1. That heretofore and on or about May 1, 1915, at New York City, the defendant, Thomas Jones, made, executed and delivered his certain promissory note in writing, of which the following is a copy:

\$500.00

NEW YORK, May 1, 1915.

Thirty days after date, I promise to pay to the order of David Roe, the sum of five hundred (\$500.00) dollars, payable at the Chemical National Bank, New York City, with interest.

Value received.

THOMAS JONES.

2. That the defendant, David Roe, indorsed the same and delivered it so indorsed.

3. That thereafter the defendants, Richard Smith and William Black, indorsed the same in blank, and delivered it so indorsed, and thereafter and before its maturity it lawfully came into the hands of the plaintiff for value.

4. That at maturity, said note was duly presented for payment, and payment thereof then and there demanded, but the same was not paid, all of which due notice was given to the defendants.

5. That no part of said note has been paid.

Wherefore the plaintiff demands judgment against the defendants for the sum of \$500, with interest thereon from the 1st day of May, 1915, together with the costs of this action.

JOSEPH STORY,

Plaintiff's Attorney,

50 Wall Street,

New York City.

(Verification.)

Q. Draw a complaint in a county court, asking judgment for the highest amount there obtainable for personal services.

A. County Court,
Kings County.

THOMAS JONES, <i>Defendant,</i> <i>against</i> JOHN BROWN, <i>Plaintiff.</i>
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} Section 340, Code of Civ. Pro.

John Brown, plaintiff in the above entitled action, by Joseph Story, his attorney, complains of the defendant and alleges:

1. That the above named defendant is a resident of the county of Kings.

2. That between the 2d day of January, 1915, and the 10th day of December, 1915, at 50 Montague Street, in the borough of Brooklyn, New York City, plaintiff rendered certain services to the defendant at his request, as his private secretary.

3. That the same were reasonably worth \$2,000.

4. That no part of the same has been paid.

Wherefore the plaintiff demands judgment against the defendant for the sum of \$2,000, with interest from the 10th day of December, 1915, together with the costs of this action.

JOSEPH STORY,
Plaintiff's Attorney,
50 Wall Street,
New York City.

(Verification.)

The highest amount obtainable in a county court is \$2,000, according to sec. 340 of the Code of Civ. Pro.

(NOTE.) If the complaint asks for judgment for amounts, totalling more than \$2,000, it is demurrable. *Owen v. Brown*, 78 Misc. 273.

Q. Give the different grounds of demurrer to a complaint.

A. Section 488 of the Code provides that: "The defendant may demur to the complaint, where one or more of the following objections thereto appear upon the face thereof: 1. That the

court has not jurisdiction of the person of the defendant. 2. That the court has not jurisdiction of the subject of the action. 3. That the plaintiff has not legal capacity to sue. 4. That there is another action pending between the same parties, for the same cause. 5. That there is a misjoinder of parties plaintiff. 6. That there is a defect of parties, plaintiff or defendant. 7. That causes of action have been improperly united. 8. That the complaint does not state facts sufficient to constitute a cause of action."

Q. What are the grounds on which you can demur to an answer, and also the grounds of demurrer to a counterclaim?

A. The one ground of demurrer to an answer is given in sec. 494 of the Code as follows: "The plaintiff may demur to a counterclaim or a defense consisting of new matter, contained in the answer, on the ground that it is insufficient in law, upon the face thereof." The grounds of demurrer to a counterclaim are contained in sec. 495 of the Code. This section is as follows: "The plaintiff may also demur to a counterclaim, upon which the defendant demands an affirmative judgment, where one or more of the following objections thereto, appear upon the face of the counterclaim: 1. That the court has not jurisdiction of the subject thereof. 2. That the defendant has not legal capacity to recover upon the same. 3. That there is another action pending between the same parties, for the same cause. 4. That the counterclaim is not of the character specified in sec. 501 of this act. 5. That the counterclaim does not state facts sufficient to constitute a cause of action." On demurrer generally, see secs. 487 to 499, inclusive.

Q. A brings an action in the Supreme Court against B. A demurred to the new matter contained in B's answer on the ground that it was insufficient in law upon the face thereof. B did not demur to A's complaint. It was admitted on the argument of A's demurrer that both pleadings were demurrable, the complaint not stating facts sufficient to constitute a cause of action. What should be the decision of the court?

A. A's demurrer to B's answer must be overruled, as on a demurrer to an answer for insufficiency the defendant may attack the complaint on the ground that it does not state facts sufficient to constitute a cause of action. *People v. Booth*, 32 N. Y. 397; *Village v. Cobb*, 80 Hun, 27. A demurrer runs through the entire record and reaches back to condemn the first pleading that is defective in substance, because "he who does not plead so as to invite an issue cannot compel his adversary to so plead as to accept it." The old rule is that "a bad answer is good enough for a bad complaint." *Clark v. Poor*, 73 Hun, 43; *Pollitz v. Wabash R. R.*, 207 N. Y. 123; *Vulcan Iron Works v. P. E. Co.*, 144 App. Div. 827; *Pease Oil Co. v. Monroe Oil Co.*, 78 Misc. 293.

Q. A complaint served in the Supreme Court does not state facts sufficient to constitute a cause of action. Defendant puts in a general denial. Upon the trial can the defendant take advantage of the situation? If so, in what way? If not, why not?

A. The defendant can move to dismiss at the trial before the plaintiff opens, on the ground that the complaint does not state facts sufficient to constitute a cause of action. This defect is not waived by the failure to interpose a demurrer, according to sec. 499 of the Code of Civ. Pro., which is as follows: "If such an objection is not taken either by demurrer or answer, the defendant is deemed to have waived it; except to the jurisdiction of the court, or the objection that the complaint does not state facts sufficient to constitute a cause of action."

Q. Plaintiff sues for \$25. The defendant in his answer makes no reference to the plaintiff's cause of action, but sets up a counterclaim for \$50 for a debt past due on a note made by plaintiff. No further pleading is served. The case was noticed for trial. At the trial both sides move for judgment. What should the court do? What about the costs? If you were the defendant's attorney, what would you have done before or at the trial?

A. The court should give judgment for the defendant for \$25 with costs. The defendant's attorney should have entered up judgment on the pleadings for \$25 before the trial. The defendant by not mentioning plaintiff's cause of action in his answer, is deemed to have admitted it, and the plaintiff, by not replying to the defendant's counterclaim, must be deemed to have admitted his liability thereon. See secs. 515 and 522 of the Code of Civ. Pro. Costs go to the defendant as judgment is in his favor, the counterclaim exceeding the amount of the plaintiff's demand. See secs. 504 and 3229 of the Code. *Len-non v. Charig*, 54 Misc. 298; *Ury v. Wilde*, 15 Civ. Pro. Rep. 451.

Q. A sues B. B has previously obtained judgment against A in an action of tort. Under our Code, a cause of action arising on a tort cannot be set up as a counterclaim against a cause of action on contract. Can this judgment be pleaded as a set-off by B?

A. Yes. "A judgment is a contract of the highest nature known to the law—and actions upon judgments are actions upon contract. The cause or consideration is of no importance, it being merged in the judgment. Hence in an action upon contract, the defendant may set up as a counterclaim a judgment obtained by him against the plaintiff in an action of tort. The original cause of action having disappeared, the judgment remains as a contract between the parties. If suit were brought upon the judgment, it would be an action upon a contract, and it is not the less so when set up as a counterclaim." *Woodruff, J.*, in *Taylor v. Root*, 4 Keyes, 335. See also *G. P. & R. Co. v. Mayor*, 108 N. Y. 276; *Cottle v. R. R.*, 27 App. Div. 604; *Knight v. Rotschild*, 132 App. Div. 277.

Q. A brings an action against B for the purchase price of a horse. B sets up a counterclaim for damages caused by the false and fraudulent representations of A to induce B to purchase said horse. Question arises as to the right of defendant to plead the counterclaim as above set forth. What do you say? Give reasons.

A. The defendant may counterclaim the damages caused by the plaintiff's false and fraudulent representations, where the defendant seeks to recover upon such contract. While it is true that a tort cannot be set up as a counterclaim in an action on contract, nevertheless when it arises out of the same transaction, the counterclaim can be pleaded. Sections 501 and 502 of the Code; *Carpenter v. Ins. Co.*, 93 N. Y. 552; *Hall v. Werner*, 18 App. Div. 565; *Vandervoort v. Mink*, 113 App. Div. 601.

Q. When is a reply necessary? What is the effect of a failure to reply?

A. A reply is only necessary where the defendant has interposed a counterclaim. Section 514 of the Code. If the plaintiff fails to reply or demur to the counterclaim, the defendant may apply, upon notice, for judgment thereupon. Section 515 of the Code. Although a reply is only necessary to a counterclaim, yet in certain cases a reply may be ordered by the court as provided in sec. 516, which is as follows: "Where an answer contains new matter, constituting a defense by way of avoidance, the court may, in its discretion, on the defendant's application, direct the plaintiff to reply to the new matter. In that case, the reply, and the proceedings upon failure to reply, are subject to the same rules as in the case of a counterclaim."

Q. A man is sued for goods sold and delivered. He comes to you with a receipted bill for the goods. Draw him up an answer to the complaint, omitting title and verification.

A. (Caption and title, same as in preceding forms.)

John Brown, the defendant in the above entitled action, appearing therein by Joseph Story, his attorney, for answer to the complaint herein alleges.

That on or about the 10th day of May, 1915, he paid said plaintiff the sum of \$60 in full payment for the goods mentioned and described in said complaint, as sold and delivered by the plaintiff to the defendant.

Wherefore the defendant demands judgment dismissing said complaint with costs.

JOSEPH STORY,
Defendant's Attorney,
50 Wall Street,
New York City.

(Verification.)

Q. A gave a note to B for \$100, dated May 1, 1909, due on demand. On June 10, 1915, B sued A on it. Draw an answer for A, omitting title and verification.

A. (Caption and title.)

A, the defendant in the above entitled action, by James Kent, his attorney, for answer to the complaint herein alleges:

That this action was not commenced within six years after the cause of action accrued.

Wherefore the defendant demands judgment dismissing the complaint with costs.

JAMES KENT,
Defendant's Attorney,
75 Wall Street.
New York City.

(Verification.)

(NOTE.) A note payable on demand is due immediately, and therefore the Statute of Limitations begins to run from its date. *Mills v. Davis*, 113 N. Y. 243.

Q. X and Y are each engaged in the dry goods business in the City of Buffalo. They dealt with each other during the period between June 1, 1905, and June 1, 1909. They both kept in the usual books the accounts of their dealings with each other. These accounts were mutual, open and current. On June 1, 1909, the date of the last charge in X's account, the books showed a balance due from Y to X of \$500. X brings suit to recover this amount on June 1, 1914. Y's attorney in his answer sets up the Statute of Limitations as a defense to all items prior to June 1, 1908. Is the defense good?

A. No. Y's claim cannot be allowed, as the Statute of Limitations did not begin to run until the date of the last item of the account (June 1, 1909), therefore the six years of limitation had not expired when the action was brought, June 1, 1914. This is provided for by sec. 386 of the Code which is as follows: "In an action brought to recover a balance due upon a mutual, open, and current account, where there have been reciprocal demands between the parties, the cause of action is deemed to have accrued from the time of the last item, proved in the account on either side.

Q. A sues B on a note which is eight years overdue. No payments have been made, and no indorsements of liability have been made thereon. B comes to you with the complaint. How would you take advantage of the defense?

A. The claim of course is barred by the Statute of Limitations, the note being more than six years overdue. Section 382 of the Code. The defense of the Statute of Limitations can only be taken advantage of by answer, according to sec. 413 of the Code, which is as follows: "The objection, that the action was not commenced within the time limited, can be taken only by answer. The corresponding objection to a defense or counterclaim can be taken only by reply; except where a reply is not required, in order to enable the plaintiff to raise an issue of fact, upon an allegation contained in the answer."

Q. A sues B for goods sold and delivered. B puts in an answer of general denial, and on the trial offers to prove payment. Will he be allowed to do so?

A. No. Payment is an affirmative defense. All facts which show the plaintiff's allegations to be untrue may be proved under a general denial, while matters in avoidance merely, which are consistent with the truth of plaintiff's averment, but show that he has no cause of action, are affirmative defenses, and must therefore be specifically pleaded. "Payment, whether total or partial, of the indebtedness sued for, cannot be proved

under a general denial, even though the complaint contains the usual formal but unnecessary allegation of nonpayment, and this be specifically traversed." *McKyring v. Bull*, 16 N. Y. 297; *Conkling v. Weatherwax*, 181 N. Y. 258.

(NOTE.) "But if the complaint alleges that no part of the indebtedness shown has been paid, except specified sums, and demands judgment for the balance, a general denial puts in issue the allegation that no other payments have been made, and lets in evidence of other payments than those admitted. Where plaintiff sues for a balance, he voluntarily invites examination into the amount of the indebtedness, and the extent of the reduction thereof by payments." *Quinn v. Lloyd*, 41 N. Y. 349. "Where a complaint contains an allegation of nonpayment as a necessary and material fact to constitute the cause of action, proof of nonpayment is admissible under a general denial." *Knapp v. Roche*, 94 N. Y. 333. "As a general rule payment is an affirmative defense and cannot be proven under a general denial. But where the plaintiff declares generally, upon a balance due, so as to leave both sides of the account open upon the general issue, the defendant may prove payment under a general denial. If, however, the plaintiff alleges a specific amount as originally due and admits partial payments thereon, a general denial puts in issue the original amount, but does not permit proof of payments thereon beyond the amount admitted in the complaint." *Acharan v. Samuel Bros.*, 144 App. Div. 182.

Q. A sues B in ejectment. B answers by general denial only. On the trial B offered to prove title to the premises in C. A objected to the evidence as being inadmissible under the pleadings. What was the ruling of the court?

A. The evidence is admissible. In ejectment, the defendant may prove title in a third party under a general denial, because plaintiff must prove title to establish his cause of action. *Raynor v. Timerson*, 46 Barb. 518; *Gilman v. Gilman*, 111 N. Y. 265; *Benton v. Hatch*, 122 N. Y. 322; *Feinberg v. Allen*, 143 App. Div. 870.

Q. A by his attorney, served a complaint on B in an action for trespass, alleging that B entered upon his land and broke down several fences. B's attorney in his answer pleads a general denial and also sets up that the title to the property belongs to C. At the trial A's attorney proves possession, the trespass, and damages, then rests, offering no evidence as to

A's title. B's attorney offers evidence showing title in C and closes his case. No other evidence is offered on either side. Who should have judgment?

A. Judgment should be given for A, as in an action of trespass on real estate in the possession of the plaintiff, the possession is sufficient to maintain the action against a wrongdoer. *Rood v. N. Y. & E. R. R.*, 18 Barb. 84. A general denial, therefore, does not put the plaintiff's title in issue. Title not being in issue it was not necessary for A, the plaintiff, to prove his title. *Squires v. Seward*, 16 How. Pr. 478; *Hill v. Water Commrs. of Watkins*, 77 Hun, 491; *Lynk v. Weaver*, 128 N. Y. 177.

Q. A sues B in conversion for taking certain furniture which A was in possession of. B answers with a general denial and at the trial offers evidence to show title in C, a stranger. The testimony is objected to. What should be the ruling of the court?

A. Objection should be sustained. "In an action for the unlawful taking and conversion of chattels, where plaintiff was in actual possession of the chattels at the time of the taking, defendant to prevail must connect himself in some way with the owner and show that the taking was by his authority, or by virtue of process or right acquired through legal proceedings against him. It is no defense to show title in a third person." *Wheeler v. Lawson*, 103 N. Y. 40. Therefore a general denial does not put title in issue, hence the proof should not be allowed. It has been repeatedly held that where property is taken from the possession of a person by a wrongdoer the party can maintain an action for the wrong though he is not the owner of the property. *Frost v. Mott*, 34 N. Y. 253; *Stowell v. Otis*, 71 N. Y. 38; *Adelberg v. Horowitz*, 32 App. Div. 410; *Smith v. Holt*, 37 App. Div. 25.

Q. A sues B for slander. B pleads a general denial only, and on the trial, he offers to prove the general bad reputation

of A. A has not been a witness. A's attorney objects. What should be the ruling of the court? Give your reasons.

A. The objection should be sustained, as circumstances in mitigation, such as the bad reputation of the plaintiff, must be set up in the answer, in order to make evidence thereof admissible. *Willover v. Hill*, 72 N. Y. 38.

Q. A sues B on a promissory note in 1908. The note was payable on demand, and was dated January 1, 1901. B answered by general denial. At the trial, B attempts to prove that the note is barred by the Statute of Limitations. Ought he be allowed to do so over A's objection?

A. No. The Statute of Limitations is an affirmative defense, and to be available, must be specifically set up in the answer. Section 413 of Code, *supra*; *Sage v. Culver*, 147 N. Y. 241; *Devoe v. Lutz*, 133 App. Div. 356.

Q. A sells B certain goods for the price of \$60. There is no memorandum signed by either party. B refuses to take the goods, and A sues him for the price. B answers by general denial, and at the trial attempts to introduce the defense of the Statute of Frauds. A objects. Is the objection good?

A. The objection should be sustained. It is now well settled that the Statute of Frauds is an affirmative defense, and must be specifically pleaded. It cannot be taken advantage of under a general denial. When the defendant does not plead the Statute of Frauds in his answer, he is deemed to have waived its benefits. *Barret v. Johnson*, 77 Hun, 527; *Duffy v. O'Donovan*, 46 N. Y. 226; *Marston v. Sweet*, 66 N. Y. 206; *Crane v. Powell*, 139 N. Y. 379.

(NOTE.) Under a general denial, the defendant cannot take advantage of any statute; he must do so by setting it up in the answer. "The objection if the defect appears upon the face of the complaint, must be taken by demurrer. (Code, sec. 488.) If it does not appear upon the face of the complaint, it may be taken by answer. (Code, sec. 498.) And if neither taken by demurrer or answer is deemed to have been waived. In this case, it ap-

pears that the defendant has answered, and the answer contains merely a general denial. It would seem to be clear, therefore, that he has waived the right to raise any question based upon the statute referred to." *Parmele Co. v. Haas*, 171 N. Y. 579.

Q. A sues B upon an account stated. B interposes an answer of general denial, and at the trial attempts to prove that the account was between B and C and that his indebtedness is to C. A objects on the ground that the defendant cannot do so under a general denial. How should the court decide, and why?

A. B should be allowed to prove that the account was between himself and C. "All of the questions seem to have been excluded upon the theory that they were inadmissible under the answer. But under his general denial, the defendant had the right to give any evidence which would show that there was actually no account between him and the plaintiff, and that he had no dealings at any time with her, because if there were no accounts and no dealings between them, then there was nothing upon which an account could be stated; and he had the right to give any evidence tending to show that no account had been stated." *Earl, J., in Field v. Knapp*, 108 N. Y. 87.

Q. When and how must a verification be made by a party pleading?

A. This question is answered by sec. 525 of the Code of Civ. Pro., which is as follows: "The verification must be made by the affidavit of the party, or, if there are two or more parties united in interest, and pleading together, by at least one of them, who is acquainted with the facts, except as follows: 1. When the party is a domestic corporation, the verification must be made by an officer thereof. 2. Where the people of the state are, or a public officer, in their behalf, is the party, the verification may be made by any person acquainted with the facts. 3. Where the party is a foreign corporation; or where the party is not within the county where the attorney

resides, or if the latter is not a resident of the state, the county where he has his office, and capable of making the affidavit; or, if there are two or more parties united in interest, and pleading together, where neither of them acquainted with the facts is within the county, and capable of making the affidavit; or where the action or defense is founded upon a written instrument for the payment of money only, which is in the possession of the agent or the attorney; or where all the material allegations of the pleading are within the personal knowledge of the agent or the attorney; in either case, the verification may be made by the agent or the attorney for the party."

Q. Draw a verification by an attorney to a complaint in an action for goods sold and delivered, where a client resides in a different county from that of his attorney.

A. STATE OF NEW YORK, COUNTY OF NEW YORK, ss.

Joseph Story being duly sworn, deposes and says: That he is the attorney for the plaintiff herein, and resides at No. 56 Charles Street, in the City of New York, County of New York; that he has read the foregoing complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters, he believes it to be true.

Deponent further says, that the sources of his information, and the ground of his belief as to the matters not stated upon his knowledge are (state facts).

Deponent further says that the reason this verification is not made by the plaintiff is, that the plaintiff is not within the said county of New York.

JOSEPH STORY.

Sworn to before me this
10th day of May, 1908.

THOMAS JONES,
Notary Public,
New York County.

This is provided for by sec. 526 of the Code, which is as follows: "The affidavit of verification must be to the effect, that the pleading is true to the knowledge of the deponent except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true. Where it is made by a person, other than the party, he must set forth, in the affidavit, the grounds of his belief, as to all matters not stated upon his knowledge, and the reason why it is not made by the party."

Q. A brings action against a newspaper publishing company for libel. The attorney for A serves a verified complaint, and the attorney for the company serves an unverified answer. What proceedings, if any, should A's attorney take?

A. A's attorney cannot do anything, he must go to trial. In an action for libel, even though the complaint is verified, the defendant need not verify his answer, because the defendant would be privileged from testifying as a witness, concerning an allegation or denial contained in his answer. *Wilson v. Bennett*, 2 Civ. Pro. Rep. 34; *Goff v. Star Printing Co.*, 21 Abb. N. C. 211. It is also provided for in sec. 523 of the Code, as follows: "Where a pleading is verified, each subsequent pleading, except a demurrer, or the general answer of an infant by his guardian ad litem, must also be verified. But the verification may be omitted, in a case where it is not otherwise specially prescribed by law, where the party pleading would be privileged from testifying, as a witness, concerning an allegation or denial contained in the pleading. A pleading cannot be used, in a criminal prosecution against the party, as proof of a fact admitted or alleged therein." Section 1757 of the Code provides in a suit for divorce on the ground of adultery as follows: "The answer of the defendant may be made, without verifying it, notwithstanding the verification of the complaint, except that an answer containing a counterclaim, which charges adultery must be verified in respect of such counterclaim, where the complaint is verified."

Q. Your client is sued. You answer, and in addition to

separate defenses plead a counterclaim then existing in his favor, which has but six months to run before it will be barred by the Statute of Limitations. The case is at issue for a year, and is then discontinued by the plaintiff. What would you advise in such a case?

A. The defendant has the right to object to the discontinuance of the action, as his counterclaim would be endangered thereby. "The court will not refuse leave to plaintiff to discontinue his action, although a counterclaim has been interposed by the defendant, unless it appear that the counterclaim would be jeopardized by the discontinuance." *Pac. Mail S. S. Co. v. Leuling*, 7 Abb. Pr. (N. S.) 37. See also *Livermore v. Bainbridge*, 43 How. Pr. 273; *Gwathmey v. Cheatham*, 21 Hun, 576.

Q. A case is at issue. The plaintiff learns of certain facts after issue has been joined, which he would like to add for the purpose of strengthening his case. By what methods can he get these facts before the court?

A. By amending the complaint. The amendment may be made within twenty days after issue is joined; of course, without costs, and without application to the court. Section 542 of the Code. If after the expiration of twenty days, application must be made to the court for leave. The court may, on such terms as it deems just, grant an order amending the complaint, and permit the insertion of the newly discovered facts. Section 723 of the Code.

Q. Plaintiff's attorney notices a case for trial within twenty days after the service of an answer upon him. After the notice was served, and within twenty days, the defendant's attorney serves a bona fide amended answer, setting up a new defense, regularly upon the plaintiff's attorney. Plaintiff's attorney seeks to force defendant to trial for the term of court for which notice was served. Note of issue was regularly filed, and the case put on the calendar. The amended answer was served

so late, that new notice of trial could not be given. Can the defendant be compelled to try at that term?

A. No. "Where after issue has been joined in an action, and the same has been regularly noticed for trial by plaintiff, and the defendant, in good faith, and within the time allowed by law, serves an amended answer, the issue theretofore joined and noticed for trial is destroyed, and the action cannot be tried until new issues have been joined and regularly noticed for trial. Where an amended pleading is served in bad faith, the remedy of the party aggrieved is by motion to strike it out." *Ostrander v. Conkey*, 20 Hun, 421. See also *Clifton v. Brown*, 27 Hun, 231; *Coles v. Lamb*, 19 App. Div. 236.

Q. Plaintiff in an action for breach of contract, in his complaint, demanded judgment for \$2,000. The jury gave him a verdict for \$3,000. How, if at all, can the plaintiff avail himself of this?

A. "Where a jury awards damages exceeding the amount demanded in the complaint, the plaintiff cannot amend the complaint unless he abandons the verdict, pays costs, and consents to a new trial." *Decker v. Parsons*, 11 Hun, 295. "Accordingly in all actions for the recovery of damages, whether sounding in tort or on contract, the sum in the conclusion of the complaint must be sufficient to cover the real demand; it would be unjust to allow it to be enlarged after verdict, without granting a new trial, as the defendant may have gone to trial, relying that no more damages than the sum claimed could be recovered against him." *Pharis v. Gere*, 31 Hun, 443.

Q. A brought action against B and C for assault and battery. The complaint stated a cause of action against both, and the proof on the trial sustained the allegation of the complaint. Both B and C appeared and defended the action. The jury found a verdict for \$1,000 for the plaintiff. The complaint in the prayer for relief, through an inadvertence, demanded judgment only against B, who was financially irresponsible. On the day subsequent to the trial, A's attorney, having dis-

covered the defect of his complaint, makes a motion before the trial court, which was opposed, and obtained an order permitting him to so amend the complaint, as to demand judgment against both B and C, and then entered a judgment against both. C appeals. Who wins and why?

A. C wins. "The complaint in this case should have been amended before the verdict. Doubtless the court under sec. 723 of the Code, on motion, could have allowed such an amendment at any time before the submission of the case to the jury. After the verdict, the court possessed no such power. The effect of such an amendment and order was to make such a verdict as the jury never in fact rendered." *Bradley v. Shaffer*, 64 Hun, 428.

Q. A purchases cigars of the Amalgamated Cigar Co. of New York; cigars to be according to sample. A keeps the cigars, says nothing, and in an action for their price, judgment is taken against him by default, which judgment he pays. He afterwards buys other cigars from the same firm, which are according to sample, and in an action for their price, sets up his damage on the former shipment as a counterclaim in the action. Can the counterclaim be maintained?

A. Yes, for a breach of warranty is not a defense to an action for the purchase price of goods, but is merely available by way of counterclaim. It is the settled rule that one, having a counterclaim, is not bound to set it up, when an action is brought against him by the one against whom the counterclaim exists, but may sue upon the counterclaim as an independent cause of action, which it is, at any time. *Brown v. Gallaudet*, 80 N. Y. 413; *Ogden v. Pioneer Iron Works*, 91 App. Div. 396; *Walkup v. Mesick*, 110 App. Div. 326.

Q. A tenant is sued for rent of his premises by his landlord, and appears but does not answer. Judgment was taken by default. Afterwards the tenant sues the landlord for damages caused by a former eviction. The landlord sets up the judgment by default in the former action by him as a defense. The

tenant plaintiff demurs to the answer. Judgment for whom and why?

A. Judgment for the landlord. While, as we have seen, a defendant, having a counterclaim, is not bound to set it up, yet when the same facts constitute a counterclaim and a defense, and he does not defend the action, a judgment rendered against him becomes *res adjudicata*, upon any defense which the defendant might have interposed. The defendant might have set up the defense of eviction, and as he did not avail himself of it, he is concluded by the former judgment. *Phipps v. Opbrandy*, 69 App. Div. 497.

(NOTE.) "A judgment rendered on the merits is coextensive with the issues upon which it is founded, and is conclusive between the parties thereto, not only to the matters actually proved and submitted for decision, but also as to every other matter directly at issue by the pleadings, which the defeated party might have litigated." *Lorillard v. Clyde*, 122 N. Y. 41. "The doctrine of *res adjudicata* applies not only to judgments rendered after a litigation of the matters in controversy, but also to judgments upon default and confession, and as to every defense that might have been raised." *Brown v. Mayor*, 66 N. Y. 385. See also *Jarvis v. Driggs*, 69 N. Y. 143; *Simon v. Bierbauer*, 154 App. Div. 506.

Q. A brings summary proceedings against B to recover possession of certain premises leased to him. Judgment was rendered by default. Subsequently B brings action against A to recover damages for breach of the alleged agreement, whereby A agreed to allow B to remain in possession for six months after the expiration of the lease. A sets up the judgment in the first action as a defense. Judgment for whom and why?

A. Judgment for A. "Either the plaintiff or the defendant had a right to the possession of the premises. If under any agreement, plaintiff had such a right, she could not be dispossessed or removed. Any agreement which authorized her to keep possession was a perfect defense to the summary proceedings, and if such an agreement existed, no judgment of removal was authorized. Such agreement, not having been set up or proved, plaintiff is not in a position to claim that she

had a right to the possession of the premises. She had had her day in court, with full opportunity to be heard and to assert and protect her rights, and having failed to do so at the proper time, the record of the proceedings upon which she might have done so, is a bar to her right to recover in the action." *Nemetty v. Nayler*, 100 N. Y. 562. See also *Reich v. Cochrine*, 151 N. Y. 122; *Barber v. Kendall*, 158 N. Y. 401.

Q. What is the office of a bill of particulars? Will a bill of particulars of an answer be granted, and when?

A. The office of a bill of particulars is to extend and define the pleading, so as to enable the adverse party to prepare to meet the case to be made against him. It is not a means of discovery of the evidence to be relied upon by the other side. A bill of particulars is an amplification of the pleadings. A defendant, as well as a plaintiff, may be required to furnish particulars of his claim, and this includes not merely the case of an affirmative claim, as a counterclaim, but also of matter set up merely as a defense. *Bishop's Code Prac.* 191; *Ball v. Ev. Post Pub. Co.*, 38 Hun, 11; 100 N. Y. 602. Section 531 of the Code provides in part as follows: "The court may, in any case, direct a bill of particulars of the claim of either party to be delivered to the adverse party." The leading case on the subject is *Tilton v. Beecher*, 59 N. Y. 176. In this case the court said: "That in almost every kind of case in which the defendant can satisfy the court that it is necessary to a fair trial, that he should be apprised beforehand of the particulars of the charge which he is expected to meet, the court has authority to compel the adverse party to specify those particulars, so far as is in his power." See also *Dwight v. Ger. Life Ins. Co.*, 84 N. Y. 493.

Q. What is the purpose and object of an affidavit of merits? Draw one.

A. The purpose of an affidavit of merits is to prevent application being made to the court for the mere purpose of delay.

The affidavit is required when an ex parte application is made asking an extension of time, etc. Rule 24 of the General Rules of Practice provides: "That no order extending the defendant's time to answer or demur shall be granted, unless the party applying for such order shall present to the court an affidavit of merits."

Supreme Court,
New York County.

JOHN BROWN, *Plaintiff*,
 against
THOMAS JONES, *Defendant*.

} AFFIDAVIT OF MERITS.

CITY AND COUNTY OF NEW YORK, ss.

Thomas Jones being duly sworn, says, that he is the defendant in the above entitled action, that he has fully and fairly stated the case to Joseph Story, his counsel in this action, who resides at No. 5 East 12th Street, in the City of New York, and that he has a good and substantial defense on the merits to the action, as he is advised by said counsel, after such statement made as aforesaid, and verily believes it to be true.

THOMAS JONES.

Sworn to before me this
10th day of June, 1915.

RICHARD GRAY,
Notary Public,
New York County.

Q. What is an injunction, and in what cases is it granted?

A. This question is answered by secs. 603 and 604 of the Code of Civ. Pro.; sec. 603 is as follows: "Where it appears, from the complaint, that the plaintiff demands and is entitled to a judgment against the defendant, restraining the commission or continuance of an act, the commission or continuance of which, during the pendency of the action, would produce injury to the plaintiff, an injunction order may be granted to restrain it. The case, provided for in this section, is described in this act,

as a case, where the right to an injunction depends upon the nature of the action." Section 604 provides as follows: "In either of the following cases an injunction order may also be granted in an action: 1. Where it appears, by affidavit, that the defendant, during the pendency of the action, is doing, or procuring, or suffering to be done, or threatens, or is about to do, or to procure, or suffer to be done, an act, in violation of the plaintiff's rights, respecting the subject of the action, and tending to render the judgment ineffectual, an injunction order may be granted to restrain him therefrom. 2. Where it appears, by affidavit, that the defendant, during the pendency of the action, threatens, or is about to remove, or to dispose of his property, with intent to defraud the plaintiff, an injunction order may be granted, to restrain the removal or disposition."

Q. An injunction order is granted *ex parte* against your client. You desire to have the same vacated. Where, and to whom would you apply?

A. Application to vacate the order *ex parte* can only be made to the judge who granted the order, and it can only be made upon the papers upon which it was granted. See sec. 626 of the Code. The application also may be made upon notice to the court. Such an application may be founded upon the papers upon which the injunction was granted; or upon proof, by affidavit, on the part of the defendant, or both. See sec. 627 of the Code.

Q. In what causes of action can you procure an order of arrest?

A. Section 549 of the Code provides as follows: "A defendant may be arrested in an action, as prescribed in this title, where the action is brought for either of the following causes: 1. To recover a fine or penalty. 2. To recover damages for personal injury; an injury to property, including the wrongful taking, detention or conversion of personal property; breach of a promise to marry; misconduct or neglect in office, or in a professional employment; fraud, or deceit; or to recover a chattel

where it is alleged in the complaint that the chattel or a part thereof has been concealed, removed or disposed of so that it cannot be found or taken by the sheriff and with intent that it should not be so found or taken, or to deprive the plaintiff of the benefit thereof; or to recover for money received, or to recover property or damages for the conversion or misapplication of property where it is alleged in the complaint that the money was received or the property was embezzled or fraudulently misapplied by a public officer or by an attorney, solicitor or counselor, or by an officer or agent of a corporation or banking association in the course of his employment, or by a factor, agent, broker, or other person in a fiduciary capacity. Where such allegation is made, the plaintiff cannot recover unless he proves the same on the trial of the action; and a judgment for the defendant is not a bar to the new action to recover the money or the chattel. 3. To recover moneys, funds, or property held or owned by the state, or held or owned officially or otherwise for or in behalf of a public or governmental interest by a municipal or other public corporation, board, officer, custodian, agency, or agent of the state, or of a city, county, village, or other division, subdivision, department, or portion of the state, which the defendant has, without right, obtained, received, converted, or disposed of; or to recover damages for so obtaining, receiving, paying, converting, or disposing of the same. 4. In an action upon contract, express or implied, other than a promise to marry, where it is alleged in the complaint that the defendant was guilty of a fraud in contracting or incurring the liability, or that he has, since the making of the contract, or in contemplation of making of the same, removed or disposed of his property with intent to defraud his creditors, or is about to remove or dispose of the same with like intent; but where such allegation is made, the plaintiff cannot recover unless he proves the fraud on the trial of the action; and a judgment for the defendant is not a bar to a new action to recover upon the contract only." The order of arrest may also be granted in equity and divorce cases. These cases are provided for in sec. 550, which is as follows: "A defendant may also be arrested in an action wherein the judgment demanded requires the per-

formance of an act, the neglect or refusal to perform which would be punishable by the court as a contempt, where the defendant is not a resident of the state, or, being a resident, is about to depart therefrom, by reason of which nonresidence or departure there is danger that a judgment or an order requiring the performance of the act will be rendered ineffectual."

Q. What is the object of a warrant of attachment? In what actions can it be had, and what is necessary to obtain it?

A. The object of an attachment is to secure property of the defendant out of which the judgment may be satisfied when obtained. It keeps the property under the control of the court, so that it can be levied upon when execution is issued. Section 635 of the Code enumerates the cases in which the warrant may be granted. It provides that: "A warrant of attachment against the property of one or more defendants in an action, may be granted upon the application of the plaintiff, as specified in the next section, where the action is to recover a sum of money only, as damages for one or more of the following causes: 1. Breach of contract, express or implied, other than a contract to marry. 2. Wrongful conversion of personal property. 3. An injury to person or property, in consequence of negligence, fraud or other wrongful act." Section 636 of the Code states what must be shown to secure the warrant, and is as follows: "To entitle the plaintiff to such a warrant, he must show, by affidavit, to the satisfaction of the judge granting the same, as follows: 1. That one of the causes of action specified in the last section exists against the defendant. If the action is to recover damages for breach of contract, the affidavit must show that the plaintiff is entitled to recover a sum stated therein, over and above all counterclaims known to him. 2. That the defendant is either a foreign corporation or not a resident of the state; or, if he is a natural person and a resident of the state, that he has departed therefrom, with intent to defraud his creditors, or to avoid the service of a summons, or keeps himself concealed therein with the like intent; or, if the defendant is a natural person or a domestic corporation, that he or it has

removed, or is about to remove, property from the state, with intent to defraud his or its creditors; or has assigned, disposed of, or secreted, or is about to assign, dispose of or secrete property with the like intent; or where, for the purpose of securing credit or the extension of credit, the defendant has made a false statement in writing, under his own hand or signature, or under the hand or signature of a duly authorized agent, made with his knowledge and acquiescence as to his financial responsibility or standing; or, where the defendant, being an adult and a resident of the state, has been continuously without the state of New York for more than six months next before the granting of the order of publication of the summons against him, and has not made a designation of a person upon whom to serve a summons in his behalf, as prescribed in sec. 430 of this act; or a designation so made no longer remains in force; or service upon the person so designated cannot be made within the state, after diligent effort."

Q. What is an action of replevin, and what must the affidavit in such an action contain?

A. An action of replevin is one to obtain the possession of a chattel which has been wrongfully converted or detained by the defendant. Section 1695 of the Code provides as follows: "The affidavit, to be delivered to the Sheriff, as prescribed in the last section, must particularly describe the chattel to be replevied; and must contain the following allegations: 1. That the plaintiff is the owner of the chattel, or is entitled to the possession thereof, by virtue of a special property therein; the facts with respect to which must be set forth. 2. That it is wrongfully detained by the defendant. 3. The alleged cause of the detention thereof, according to the best knowledge, information, and belief of the person making the affidavit. 4. That it has not been taken by virtue of a warrant, against the plaintiff, for the collection of a tax, assessment, or fine, issued in pursuance of a statute of the state, or of the United States; or, if it has been taken under color of such a warrant, either that the taking was unlawful, by reason of defects in the process, or other causes specified, or

that the detention is unlawful, by reason of facts specified, which have subsequently occurred. 5. That it has not been seized by virtue of an execution or warrant of attachment, against the property of the plaintiff, or of any person from or through whom the plaintiff has derived title to the chattel, since the seizure thereof; or, if it has been so seized, that it was exempt from the seizure, by reason of facts specified, or that its detention is unlawful, by reason of facts specified which have subsequently occurred. 6. Its actual value.”

Q. Your client, a resident of Pennsylvania, was assaulted in that state by a resident of New Jersey. He brings an action in the Supreme Court, New York County, against his assailant, the summons being personally served upon the latter in New York City. The defendant answers, and the case comes to trial. At the close of the trial, the defendant's attorney requested the court to dismiss as the action could not be maintained in the courts of this state, which request was refused. The defendant appeals. Is the appeal good?

A. The appeal is not good. While the court might, in its discretion, have refused to entertain the action, the defendant was not entitled to a dismissal as a matter of right. “Courts of this state may in their discretion, entertain jurisdiction of any action for the recovery of damages for a personal injury between citizens of another state actually domiciled therein when the action was commenced, although the injury was committed in the state of their residence and domicile.” *Burdick v. Freeman*, 120 N. Y. 426. “The refusal of the court to entertain jurisdiction of an action between nonresidents, for a tort committed out of the state, does not depend upon the motion of the parties necessarily, but the court may refuse to do so upon its own motion.” *Winchester v. Brown*, 37 State Rep. 542.

Q. A, a resident of California, sues B, your client, a resident of New Jersey, as maker of a promissory note, naming the county of New York as the place of trial. Can you, and if so, on what grounds, procure a change of the place of trial?

A. The only grounds for procuring a change of the place of trial would be, that a fair and impartial trial could not be had in that county, or that the convenience of witnesses would be best suited by having the trial in another county. The county designated was the proper one, according to sec. 984 of the Code, which is as follows: "An action, not specified in the last two sections, must be tried in the county, in which one of the parties resided, at the commencement thereof. If neither of the parties then resided in the state, it may be tried in any county which the plaintiff designates, for that purpose, in the title of the complaint." Section 987 provides as follows: "The court may, by order, change the place of trial, in either of the following cases: 1. Where the county, designated for that purpose in the complaint, is not the proper county. 2. Where there is reason to believe, that an impartial trial cannot be had in the proper county. 3. Where the convenience of witnesses, and the ends of justice, will be promoted by the change."

Q. Plaintiff resides in A county. Defendant resides in B county. Plaintiff brings an action on a transitory cause of action in C county. The defendant asks for a change for the place of trial from C to B county. On the argument of the motion, the plaintiff produces affidavits showing that all the witnesses reside in C county. Should the affidavits be admitted in determining the question?

A. No. The defendant is entitled to a change as a matter of right to his own county, when a county in which neither of the parties reside is designated. "On a motion to change the place of trial of an action to the county in which both parties reside as required by sec. 984 of the Code, the plaintiff should not be permitted to read affidavits showing that the convenience of witnesses requires that the trial take place in the county named in the summons and complaint. The proper practice is to change the place of trial to the proper county, and allow the plaintiff to make a motion to change it back to the county designated in the summons for the convenience of witnesses." *Sylvester v. Lewis*, 55 App. Div. 470. See also

Acker v. Leland, 96 N. Y. 383; Mills v. Starin, 119 App. Div. 336.

Q. A summons and complaint has been served upon your client, in which the proper county is not named. The above are the only papers that have been served in the action. You desire to change the county of trial to the proper one before answering. State what you would do.

A. This is answered by sec. 986 of the Code which is as follows: "Where the defendant demands that the action be tried in the proper county, his attorney must serve upon the plaintiff's attorney, with the answer, or before service of the answer, a written demand accordingly. The demand must specify the county, where the defendant requires the action to be tried. If the plaintiff's attorney does not serve his written consent to the change, as proposed by the defendant, within five days after service of the demand, the defendant's attorney may, within ten days thereafter, serve notice of a motion to change the place of trial."

Q. Upon the trial of an action, the attorneys for both parties ask that a verdict be directed, each in favor of his client. The motion of the one is denied, and the motion of the other is granted. The one whose motion was denied appeals, on the ground that he produced sufficient evidence to warrant the case being submitted to the jury. What should be the decision on appeal?

A. The appeal should be dismissed. A request by both parties for the direction of a verdict is a virtual consent to the determination of the issues by the court. When both request the direction of a verdict, they submit to the court for decision any question of fact presented by the evidence. "The effect of a request by each party for a direction of a verdict in his favor clothed the court with the functions of the jury, and it is well settled that in such a case where the party whose request is denied does not thereupon request to go to the jury on the facts, a verdict directed for the other party stands,

as would the finding of a jury, for the same party, in the absence of any direction, and the review in this court is governed by the same rules as apply in cases of ordinary verdicts rendered without any direction." *Thompson v. Simpson*, 128 N. Y. 270. See also *Adams v. Roscoe Co.*, 159 N. Y. 176; *Westervelt v. Phelps*, 171 N. Y. 218.

Q. The plaintiff in an action puts in his evidence, and by stipulation of the defendant's attorney leaves the state, having some important business to attend to. The defendant then puts in evidence certain statements made by the plaintiff, which the plaintiff alone could deny. The defendant's attorney had given no warning to plaintiff of his intention to introduce such evidence. If you were the plaintiff's attorney, what would you do?

A. Plaintiff's attorney should object to the admission of the evidence, and if his objection is overruled, and judgment is given against his client, he should make a motion for a new trial on the ground of surprise, which by reason of the stipulation of the defendant ought to be granted. A motion can also be made to withdraw a juror. "A party is not entitled to a new trial on the ground of surprise, because the opposite party and his counsel on the trial led him to believe that certain facts material to the defense would be admitted or not disputed, and by reason thereof, he did not introduce evidence upon such facts, so long as the conduct of the opposite party and his counsel in the matter is free from fraud or positive stipulation it forms no ground for a new trial although it might have misled." *Taylor v. Harlow*, 11 How. Pr. 285. See also *Madison v. White*, 25 Hun, 492.

Q. Upon the trial of an action in which you are one of the attorneys, you discover that a material witness through whom you expect to establish your case is absent from the state. What motion would you make?

A. A motion to withdraw a juror on the ground of surprise,

and then have a mistrial ordered. *Dillon v. Cockroft*, 90 N. Y. 649.

Q. A brings an action for goods sold and delivered against B. B's attorney in his answer pleads payment as his only defense. At the trial both A's attorney and B's attorney demand the right to open and close the case to the jury. The court sustains A's claim. B's attorney excepts and appeals from the judgment. This was the only exception he had in the case. How should the appellate court decide on appeal?

A. The judgment should be reversed. The defendant having only pleaded an affirmative defense in his answer, admitted the allegations in plaintiff's complaint setting forth the cause of action, therefore the burden of proof was upon him, the defendant. The plaintiff was not required to offer any evidence to establish his cause of action, as it was admitted. Therefore plaintiff had no right to open and close the case, but the right belonged to the defendant, because he who affirms must produce the proof to sustain his affirmation. It was therefore for the defendant to establish the defense set up, and as he thus held the affirmative, he had the right to open and close the evidence, and to deny him this right was reversible error. *Fleischman v. Stern*, 90 N. Y. 110; *Conselyea v. Swift*, 103 N. Y. 606; *Merzbach v. Mayor*, 163 N. Y. 16. "A party holding the affirmative upon an issue of fact, has the right upon the trial to open and close the proof in summing up the case to the jury; such right is regarded as a legal right, not resting in the discretion of the court, and a denial thereof may be excepted to and the ruling reviewed upon appeal." *Heilbronn v. Herzog*, 165 N. Y. 98.

Q. Your client sues an infant and alleges \$2,000 damages. The summons was served on the infant, and he defaults. Describe the procedure necessary to get judgment.

A. The first thing to be done is to secure the appointment of a guardian ad litem for the infant, care being taken not to name the guardian to be appointed in the application, as

Rule 49 of the General Rules of Practice provides, that no person shall be appointed guardian ad litem of an infant, who is nominated by the adverse party. After the expiration of twenty days from the appointment of the guardian ad litem, proceedings may be taken for the entry of judgment by default. Section 1218 of the Code provides that: "A judgment by default shall not be taken against an infant defendant, until twenty days have expired, since the appointment of a guardian ad litem for him." See generally as to infants secs. 468 to 477 of the Code.

Q. A, an infant, is the holder of a promissory note for \$1,000 dated January 2, 1908, payable three months after date, made by B, payable to A's order. The note not being paid at maturity, A comes to you to sue thereon. Draw the complaint.

A. Supreme Court,
Kings County.

A, an infant, by JOHN BROWN,
his guardian ad litem, *Plaintiff*,

against

B, *Defendant*.

The plaintiff, by Joseph Story, his attorney, complaining of the defendant herein alleges:

1. That the plaintiff is an infant under the age of twenty-one years.

2. That on the 10th day of May, 1908, at Brooklyn, New York, the above named John Brown was, by an order of this court, duly appointed the guardian ad litem of the plaintiff for the purposes of this action.

3. That the defendant made, executed and delivered his certain promissory note in writing, dated the 2d day of January, 1908, at Brooklyn, New York, and thereby promised to pay to the order of the plaintiff, \$1,000 three months after date.

4. That no part of said note has been paid although duly demanded.

Wherefore, plaintiff demands judgment against defendant for the sum of \$1,000, with interest thereon from April 3d, 1908, together with the costs and disbursements of this action.

JOSEPH STORY, Plaintiff's Attorney.

Office and Post-Office Address, 50 Wall Street,
New York City.

The complaint of an infant must allege with certainty the time, place, and power of the appointment of his guardian.

Q. Draw an affidavit of service of a summons upon an infant defendant, over the age of fourteen years, in an action in the Supreme Court; the infant resides with his father.

A. STATE OF NEW YORK,
CITY AND COUNTY OF NEW YORK, } ss.

John Brown being duly sworn, deposes and says, that he is more than twenty-one years of age, and that on the 10th day of May, 1908, at 254 W. 125th Street, in the Borough of Manhattan, City of New York, he served the annexed summons on Thomas Jones, the defendant therein named, who is an infant over the age of fourteen years, by delivering to him a copy thereof and leaving the same with him, and also at the same place and time by personally delivering a copy thereof to John Jones, his father, and leaving the same with him. Deponent further states that he knew said Thomas Jones so served as aforesaid, to be the person mentioned and described in said summons as the defendant therein, and the said John Jones to be the father of the said Thomas Jones.

JOHN BROWN.

Sworn to before me this
12th day of May, 1908.

RICHARD GRAY,
Notary Public,
New York County.

Section 426 of the Code as amended by L. 1913, c. 279, governs the service of the summons upon infant defendants and is in part as follows: "Personal service of the summons upon a defendant, being a natural person, must be made by delivering a copy thereof, within the state as follows: 1. If the defendant is an infant under the age of fourteen years, to his father, mother or guardian; or if there is none within the state, to the person having the care and control of him, or with whom he resides, or in whose service he is employed. If the defendant is an infant over the age of fourteen years, to the infant in person, and also to his father, mother or guardian; or, if there is none within the state, to the person having the care and control of him, or with whom he resides, or in whose services he is employed. Where the defendant is an infant under the age of fourteen years, the Court shall in the defendant's interest, make an order, requiring a copy of the summons, to be also delivered, in behalf of the defendant, to a person designated in the order, and that service of the summons shall not be deemed complete until it is so delivered. Where the defendant is an infant over the age of fourteen years a similar order may be made by the court in its discretion, with or without application therefor."

Q. A, an infant, through his attorney prosecuted the trial of an action, and when it is about to go to the jury asks leave, by way of motion, to have a guardian ad litem, nunc pro tunc, appointed. The court grants the motion, and the defendant excepts. Judgment is given to the infant, and the defendant appeals on the sole ground that the court had no right to permit the appointment of the guardian after the case had begun. Who wins and why?

A. Judgment for A; the appeal should be dismissed. This was a mere irregularity and the court had power to allow the amendment. "The omission to appoint a guardian ad litem for an infant plaintiff before the bringing of an action, is not a jurisdictional defect, but is an irregularity merely." *Rima v. Iron Works*, 120 N. Y. 433; *Callahan v. R. R.*, 99 App. Div. 59.

Q. A brings an action against B to recover damages for personal injuries inflicted. B defaults. How will A proceed to fix the damages and obtain judgment? What rights, if any, has B in such proceeding?

A. The damages must be assessed, by means of a writ of inquiry, which is a writ directed to the sheriff's jury commanding them to fix the damages. The plaintiff cannot enter up judgment by default as a matter of course in actions for personal injuries, but must use this method to have the damages ascertained, and then he can enter judgment for the amount fixed. See secs. 1214 and 1215 of the Code. On such a proceeding before a sheriff's jury, the defendant may call witnesses and prove any matter which properly goes to mitigate the damages. But of course he cannot attack the plaintiff's cause of action. *Thompson v. Lumley*, 7 Daly, 74. Section 536 of the Code. "The rule that on an assessment of damages either at the circuit or before a sheriff's jury, a defendant may call and examine witnesses, or otherwise prove all proper mitigating circumstances, seems to be well settled." *Duffis v. Bangs*, 61 Hun, 23.

Q. How many peremptory challenges are allowed in a civil action in the supreme court? How many in an inferior court?

A. Section 1176 of the Code provides for peremptory challenges in a civil action as follows: "Upon the trial of an issue of fact, joined in a civil action in a court of record, each party may peremptorily challenge not more than six, and in a court not of record each party may peremptorily challenge not more than three of the persons drawn as jurors for the trial."

Q. What would you allege in denying corporate existence?

A. Section 1776 of the Code covers this question, and is as follows: "In an action brought by or against a corporation, the plaintiff need not prove, upon the trial, the existence of the corporation, unless the answer is verified and contains an affirmative allegation that the plaintiff, or the defendant, as the case may be, is not a corporation."

Q. A is assaulted and injured by B, and has a cause of action therefor. A assigns the cause of action to C, who brings suit upon it. Can he maintain the action?

A. No. This being a personal action is not assignable, therefore C cannot maintain the action, according to sec. 41, Pers. Prop. Law (formerly sec. 1910 of the Code) which in part is as follows: "Any claim or demand can be transferred, except in one of the following cases: 1. Where it is to recover damages for a personal injury, or for a breach of promise to marry. 2. Where it is founded upon a grant, which is made void by a statute of the state; or upon a claim to or interest in real property, a grant of which, by the transferer, would be void by such a statute. 3. Where a transfer thereof is expressly forbidden by a statute of the State, or of the United States, or would contravene public policy."

Q. A and B commit a joint assault and battery upon C. C sues A without any allegation in the complaint as to B. A demurs on the ground that B should be a party. Should the demurrer be sustained?

A. No. Joint tort feors are jointly and severally liable. "Where a personal injury results from the negligence or the willful misconduct of several tort feors, they are separately as well as jointly liable; the party injured may sue all or either of the wrongdoers." *Creed v. Hartman*, 29 N. Y. 591; *Stroher v. Elting*, 97 N. Y. 102; *Matter of Peck*, 206 N. Y. 55.

Q. A and B, two minors, assault C, who claims \$1,000 damages from each. A's father pays C \$500, which C accepts in full settlement against A, and gives a written general release without reservation of any kind. Subsequently C brings action against B to recover \$1,000 damages for the assault. Has B any defense to the action? Give your reasons.

A. B has a perfect defense to the action, as satisfaction to one joint tort feor is a satisfaction to all. "The rule is, that a party receiving an injury from the wrongful acts of others, is

entitled to but one satisfaction, and that an accord and satisfaction by or a release or other discharge by the voluntary act of the party injured, of one of two or more joint tort feorsors, is a discharge of all." *Barrett v. R. R.*, 45 N. Y. 628.

(NOTE.) While it is true that a release under seal, of a claim, given to one joint feorsor operates as a release of all, on the theory that a party is entitled to but one satisfaction for the injuries sustained by him (*Barrett v. R. R.*, supra), yet where the release contains an express reservation of the right to sue the other tort feorsors, it is not a release, but in effect is a covenant not to sue the person released, and a covenant not to sue does not release a joint tort feorsor. The release must be construed according to the clear intention of the parties and where it contains a reservation, the other tort feorsors are not discharged. *Kirby v. Taylor*, 6 Johns. Ch. 250; *Irvine v. Milbank*, 56 N. Y. 635; *Gilbert v. Finch*, 173 N. Y. 455; *Walsh v. R. R.*, 204 N. Y. 58.

Q. A is injured through the negligence of B and C. He brings suit against B, and recovers judgment, and issues execution; but as B is financially irresponsible, the execution is returned wholly unsatisfied. A then brings suit against C, who sets up the judgment which A had obtained against B as a defense. Judgment for whom and why?

A. Judgment for A. "The fact that the plaintiff recovered judgment against the Brewing Company, it not appearing that the judgment thus recovered had been actually paid or satisfied, did not debar the plaintiff from appealing from the judgment in favor of the Railroad Company, as a judgment recovered against one of two joint wrongdoers is, until paid or satisfied, no bar to the prosecution of an action for the same cause against the other wrongdoer." *Hurley v. Brewing Co.*, 13 App. Div. 167.

Q. A and B, minors, together assault C. A's father settles with C for A for \$100. C assigns his rights against B to D, who brings suit against B, your client. State how many and what defenses you would set up.

A. There are two defenses here. 1. A personal action cannot be assigned. *Pulver v. Harris*, 52 N. Y. 73; sec. 41, Pers. Prop. Law (formerly sec. 1910 of the Code). 2. Satisfaction by one

of two tort feors is a satisfaction for all. *Barrett v. R. R.*, supra; *Alexander v. Alexander*, 104 N. Y. 643.

Q. A sues B and C in an action for assault and battery committed by the two jointly. On recovering judgment, he issues execution and recovers the whole amount of B. What right, if any, has B against C? State the general rule.

A. B has no rights whatever against C, as there is no contribution between tort feors. "In actions for joint torts a joint liability exists and a recovery may be enforced against any one of the defendants. The party paying such claim has no right to contribution from the other defendants, even though by the payment he has relieved them from liability. The principle upon which these decisions are made, is that whenever the liability arises ex delicto, there is no contribution." *Andrews v. Murray*, 33 Barb. 354; *Miller v. Fenton*, 11 Paige, 18; *Jones v. Barlow*, 62 N. Y. 211.

Q. A salesgirl finds a pocketbook containing \$100 in the department store where she is employed, and turns it over to the firm. B and C both claim the money and demand the same. B brings action against the firm to recover the money. If you were the attorney for the firm, what would you do?

A. The money should be paid into court, after application, on notice to B and C, has been made, for an order substituting C, who has not brought suit, as the defendant in the action in place of the firm and to relieve the firm from liability. The order is termed an order of interpleader, and the practice is governed by sec. 820 of the Code, which is as follows: "A defendant against whom an action to recover upon a contract, or an action of ejectment, or an action to recover a chattel, is pending, may, at any time before answer, upon proof, by affidavit, that a person, not a party to the action, makes a demand against him for the same debt or property, without collusion with him, apply to the court, upon notice to that person and the adverse party, for an order to substitute that

person in his place, and to discharge him from liability to either, on his paying into court the amount of the debt, or delivering the possession of the property, or its value, to such person as the court directs; or upon it appearing that the defendant disputes, in whole or in part, the liability asserted against him by different claimants, or that he has some interest in the subject-matter of the controversy which he desires to assert, his application may be for an order joining the other claimant or claimants as codefendants with him in the action. The court may, in its discretion, make such order, upon such terms as to costs and payments into court of the amount of the debt, or part thereof, or delivery of the possession of the property, or its value or part thereof, as may be just, and thereupon the entire controversy may be determined in the action."

Q. What are the qualifications of trial jurors in New York County?

A. Section 598 of the Judiciary Law (Consolidated Laws, chap. 30) provides as follows: "In order to be qualified to serve, as a trial juror, in a court in the county of New York, a person must be: 1. A male citizen of the United States, and a resident of that county. 2. Not less than twenty-one, nor more than seventy years of age. 3. The owner, in his own right, of real or personal property, of the value of two hundred and fifty dollars; or the husband of a woman who is the owner, in her own right, of real or personal property of that value. 4. In the possession of his natural faculties, and not infirm or decrepit. 5. Free from all legal exceptions; intelligent; of sound mind and good character; and able to read and write the English language understandingly."

(NOTE.) In the county of Kings, the same qualifications exist as in the county of New York, except that he must be: "The owner, in his own right, of real property of the value of one hundred and fifty dollars, or of personal property of the value of two hundred and fifty dollars; or the husband of a woman who is the owner, in her own right, of real or personal property of that value." Section 686 of Judiciary Law.

Q. What are the qualifications of trial jurors in counties other than New York and Kings?

A. Section 502 of the Judiciary Law (Consolidated Laws, chap. 30) provides as follows: In order to be qualified to serve as a trial juror, in a court of record, a person must be: 1. A male citizen of the United States, and a resident of the county. 2. Not less than twenty-one nor more than seventy years of age. 3. Assessed, for personal property, belonging to him, in his own right, to the amount of two hundred and fifty dollars; or the owner of a freehold estate in real property, situated in the county, belonging to him in his own right, of the value of one hundred and fifty dollars; or the husband of a woman who is the owner of a like freehold estate, belonging to her, in her own right; except that in the county of Queens and Richmond a person, to be qualified to serve as such a trial juror, shall possess the property qualifications specified in subdivision three of section six hundred and eighty-six of this chapter. 4. In the possession of his natural faculties, and not infirm or decrepit. 5. Free from all legal exceptions; of fair character; of approved integrity; of sound judgment; and well informed. But a person who was assessed, on the last assessment-roll of the town, for land in his possession, held under a contract for the purchase thereof, upon which improvements, owned by him, have been made, to the value of one hundred and fifty dollars, is qualified to serve as a trial juror, although he does not possess either of the qualifications, specified in subdivision third of this section, if he is qualified in every other respect."

Q. You have an important witness residing in the state of Indiana, whose evidence you desire on the trial of an action in your county. How would you procure the evidence?

A. The evidence would be procured by the issuing of a commission, addressed to a person in the city in which the witness resides, authorizing him to take the witness's testimony, by putting to him the questions which are sent with the commission. The defendant may also send cross-questions cor-

responding to the cross-examination on a trial. Section 887 of the Code provides as follows: "In a case specified in the next section, where it appears, by affidavit, on the application of either party, that the testimony of one or more witnesses, not within the state, is material to the applicant, a commission may be issued, to one or more competent persons named therein, authorizing them, or any one of them, to examine the witness or witnesses named therein, under oath, the interrogatories annexed to the commission; to take and certify the deposition of each witness, and to return the same, and the commission according to the directions given in or with the commission. The applicant, or any other party to the action, may be thus examined." See on depositions generally, secs. 887 to 913, inclusive.

Q. A brings an action against B, serving a verified complaint, B serves a verified answer. A, believing that the facts stated in the answer are false, makes a motion to strike out the answer as a sham. Should his motion be granted?

A. No. "A verified answer cannot be stricken out as a sham. If the answer is good in form, and sets up apparently a good defense, the court will not try the issue raised by the answer, on affidavits, where the answer is verified. It is the duty of the trial court to determine whether the defense is true or false." *Wayland v. Tyson*, 45 N. Y. 281; *Ginnell v. Stayner*, 71 App. Div. 542; *Duke v. Grant*, 126 App. Div. 385. An unverified answer may sometimes be stricken out as sham. In order, however, that the pleadings should be stricken out as sham, it must be false in the sense of being a mere pretense set up in bad faith, and without color of fact. *Bishop's Code Pr.*, pp. 197, 198. See also sec. 538 of the Code. *Thompson v. R. R.*, 45 N. Y. 468.

Q. A sues B. B interposes an answer which is bad upon its face. What would you do if you were A's attorney?

A. Plaintiff's attorney should apply for judgment on the answer, on the ground that it is frivolous. An answer is

frivolous when it contains no general or special denial, and sets up no defense by way of new matter, and does not contain a counterclaim. It must be so clear and palpably bad as to require no argument to demonstrate its frivolity, and as to be pronounced frivolous, and indicative of bad faith in the pleader, upon a bare inspection. The pleading will be sustained if a material issue is presented. The pleading is not stricken out, but whatever action may be had in respect to it, it remains a part of the record and is added to the judgment roll. Judgment is taken upon it. *Cook v. Warren*, 88 N. Y. 39; *Rochkind v. Perlman*, 123 App. Div. 808; *Gibbs v. Title G. & T. Co.*, 79 Misc. 249; *Bishop's Code Pr.*, p. 195 (sec. 537 of the Code of Civ. Pro.).

Q. A, on his return from Europe, finds a judgment by default entered against him on an affidavit of personal service of the summons and complaint. In fact there was no personal service. A does nothing for more than a year, and then comes to you. What would you advise him, and what would you do, if anything?

A. The judgment can be vacated, even though more than a year has elapsed, as it was fraudulently obtained. "The power of the supreme court to control its judgments, and to set aside on motion a judgment, for fraud and deceit practiced by a party, is not subject to the limitations of time prescribed in secs. 724, 1282 and 1290 of the Code. Cases of fraud are not within these sections." *Furman v. Furman*, 153 N. Y. 309.

(NOTE.) Section 724 of the Code provides as follows: "The court may likewise, in its discretion, and upon such terms as justice requires, at any time within one year after notice thereof, relieve a party from a judgment, order, or other proceeding, taken against him through his mistake, inadvertence, surprise, or excusable neglect; and may supply an omission in any proceeding. Where a proceeding, taken by a party, fails to conform to a provision of this act, the court may, in like manner, and upon like terms, permit an amendment thereof, to conform it to the provision."

Q. The property of A, a nonresident, was attached. He was served by publication. Judgment was entered for the creditor, and execution was issued and the property attached

was sold. There was a deficiency. The creditor issued an execution against the property that was not attached, and satisfied his deficiency judgment therefrom. A sues for conversion. Who prevails?

A. A prevails. The second levy was illegal, because when the summons is served otherwise than personally on a non-resident, the judgment is substantially one in rem, and only the attached property is bound. Section 707 provides as follows: "Where a defendant, who has not appeared, is a nonresident of the state, or a foreign corporation, and the summons was served without the state, or by publication, pursuant to an order obtained for that purpose, as prescribed in chapter fifth of this act, the judgment can be enforced only against the property which has been levied upon, by virtue of the warrant of attachment, at the time when the judgment is entered. But this section does not declare the effect of such a judgment, with respect to the application of any statute of limitation." Section 1370 of the Code provides as follows: "Where a warrant of attachment, issued in the action, has been levied by the sheriff, the execution must substantially require the sheriff to satisfy the judgment, as follows: 1. Where the judgment debtor is a nonresident or a foreign corporation, and the summons was served upon him or it, without the state, or otherwise than personally, pursuant to an order obtained for that purpose, as prescribed in chapter fifth of this act, and the judgment debtor has not appeared in the action; out of the personal property attached, and, if that is insufficient, out of the real property attached. 2. In any other case, out of the personal property attached; and, if that is insufficient, out of the other personal property of the judgment debtor; if both are insufficient, out of the real property attached; and, if that is insufficient, out of the real property, belonging to him, at the time when the judgment was docketed in the clerk's office of the county, or at any time thereafter."

Q. A, who is a nonresident of New York State, was indebted to B, who resides in New York City, in the sum of \$4,000.

Three automobiles belonging to A, were in the freight depot, New York City, having been consigned to C, a dealer, by A. B brings action to recover his claim against A, attaching only two of the automobiles, the other one being on a freight car in another part of the freight depot, and was thus overlooked by the sheriff. The summons had been served on A by publication, but A appeared and defended the action. At the trial B recovered judgment for the full amount of his claim. He then issued execution and the sheriff levied upon and sold all three of the automobiles, but left the execution partly unsatisfied. A forbids the sale of the automobile not attached, and sues the sheriff in conversion. Who should have judgment?

A. Judgment should be given for the sheriff, as he was authorized to sell any or all of the property, which he found in his county, irrespective of whether he had attached it or not, as the judgment was a personal judgment having been made so by the general appearance of A in the action. The court thereby acquired jurisdiction of the person of A. The notice of appearance by A's attorney was equivalent to a personal service of the summons upon A, and gave the court jurisdiction over A's person, so that it could render a personal judgment against him. Section 424 of the Code. *Reed v. Chilson*, 142 N. Y. 152; *Grant v. C. Co.*, 117 App. Div. 576; *Tierney v. Insurance Co.*, 138 App. Div. 471.

Q. The sheriff, under an execution of a judgment, attached some sewing machines as the property of B. C makes claim to the machines as his property. What should the sheriff do to ascertain the validity of C's claim?

A. The sheriff should empanel a jury to try the validity of C's claim. This is provided for in sec. 657 of the Code as follows: "If goods or effects, other than a vessel attached as the property of the defendant, are claimed by or in behalf of another person, as his property, an affidavit may be made and delivered to the sheriff, in behalf of such person, at any time while such goods or effects or the proceeds thereof are in the sheriff's pos-

session, stating that he makes such a claim; specifying in whole or in part the property to which it relates, and in all cases stating the value of the property claimed and the damages, if any, over and above such value, which the claimant will suffer in case such levy is not released. In that case the sheriff may, in his discretion, empanel a jury to try the validity of the claim."

Q. There are two executions against the property of A, a judgment debtor, issued out of the Supreme Court of New York County, and delivered to the sheriff of New York County, where A lives for collection. One execution was in favor of C, for \$1,500 and was delivered to the sheriff on May 1st, and the other in favor of B, for \$1,500, was delivered on May 2d. The sheriff did not levy under C's execution, but levied under B's, on A's property worth \$1,500. Both creditors claimed the preference in payment from the proceeds. What are the rights of the parties?

A. C should receive the entire amount, as his execution was the first delivered to the sheriff. The property was bound by the execution from the time of the delivery thereof to the sheriff to be executed. The execution first delivered has preference in payment, even though a levy is first made under an execution subsequently delivered. Sections 1405 and 1406 of the Code provide for this as follows: "The goods and chattels of a judgment debtor, not exempt, by express provision of law from levy and sale by virtue of an execution, and his other personal property, which is expressly declared by law to be subject to levy by virtue of an execution, are when situated within the jurisdiction of the officer, to whom an execution against property is delivered, bound by the execution, from the time of the delivery thereof to the proper officer, to be executed; but not before. Where two or more executions against property are issued, out of the same or different courts of record, against the same judgment debtor, the one first delivered, to an officer, to be executed, has preference, notwithstanding that a levy is first made, by virtue of an execution subsequently delivered; but if a levy upon and sale of

personal property has been made, by virtue of the junior execution, before an actual levy, by virtue of the senior execution, the same property shall not be levied upon or sold, by virtue of the latter."

Q. A sheriff levies upon \$200 in gold and \$50 in silver under an execution. Your client is the judgment creditor, and asks the sheriff to immediately deliver the money to him. The sheriff refuses. What are the rights of the parties?

A. He can compel the sheriff to deliver to him the silver coin, but not the gold coin, as the latter must be sold according to sec. 1410 of the Code, which is as follows: "The officer to whom an execution against property is delivered, must levy upon current money of the United States, belonging to the judgment debtor; and must pay it over, as so much money collected, without exposing it for sale, except that where it consists of gold coin, he must sell it, like other personal property; unless he is otherwise directed, by an order of a judge or by the judgment in the particular cause."

Q. On January 2, 1906, A duly recovered and docketed a judgment against B for \$1,000. On February, 1906, C recovered and duly docketed a judgment against B for \$2,000. Both were unpaid and unsatisfied on March 1, 1906, when B's father died intestate, seized of an estate of real property, to which estate B succeeded as the only heir at law. A and C issued executions, and the land is sold under both executions for \$900. How is it distributed?

A. The money realized from the sale should be distributed in proportion to the amount of the judgments. Neither is entitled to the whole amount, to the exclusion of the other. "Under sec. 1251 of the Code, docketed judgments become liens simultaneously, and without priority between them, upon real property subsequently acquired by the judgment debtor during ten years from the filing of the judgment roll, at the time of his acquisition of the property. Hence where there are several judgments docketed against the judgment

debtor at the time he acquires property, the judgment first docketed is not a prior lien on such after-acquired property, but all the judgments are entitled to rank equally." *Matter of Hazard*, 73 Hun, 22, *aff'd* 141 N. Y. 586.

Q. On May 1st, 1905, A duly docketed a judgment in the office of the clerk of New York County, against B for \$2,000, and issued execution thereon on June 1st, 1906, which was returned unsatisfied. Can A issue an execution on the judgment in 1914, B still being a resident of New York County? Assuming that he had not issued execution, what would be necessary for him to do now?

A. A can issue the execution, of course, the first execution having been returned unsatisfied. If he had not issued any execution, it would have been necessary for him to apply to the court for an order granting him leave to issue the execution. This is provided for in secs. 1375, 1377, and 1378 of the Code. Section 1375 reads as follows: "Except as otherwise specially prescribed by law, the party recovering a final judgment, or his assignee, may have execution thereupon, of course, at any time within five years after the entry of judgment." Section 1377 reads: "After the lapse of five years from the entry of a final judgment, execution can be issued thereupon, in one of the following cases only: 1. Where an execution was issued thereupon, within five years after the entry of the judgment, and has been returned wholly or partly unsatisfied or unexecuted. 2. Where an order is made by the court, granting leave to issue the execution." Section 1378 provides that: "Notice of an application for an order, granting leave to issue an execution, as prescribed in the last section, must be served personally upon the adverse party, if he is a resident of the state, and personal service can, with reasonable diligence, be made upon him therein; otherwise, notice must be given in such manner as the court directs. Where the judgment is for a sum of money, or directs the payment of a sum of money, leave shall not be granted, except on proof by affidavit, to the satisfaction of the court, that the judgment remains wholly or partly unsatisfied."

Q. On August 1, 1897, A recovered judgment against B for \$1,000, but issued no execution. On September 15, 1908, without further action, A issues execution to the sheriff, and the latter sells the real estate owned by B, August 1, 1897, to C. C desires to sell to your client. Is the title good? What would you have done if you were A's attorney?

A. The title is not good. Before execution was issued, a notice should have been filed in the county clerk's office, describing the judgment, the execution and the property levied upon, according to sec. 1252 of the Code, which is as follows: "When ten years after filing the judgment roll have expired, real property or a chattel real, which the judgment debtor, or real property which a person, deriving his right or title thereto, as the heir or devisee of the judgment debtor, then has, in any county, may be levied upon, by virtue of an execution, against property, issued to the sheriff of that county, upon a judgment hereafter rendered, by filing, with the clerk of that county, a notice, subscribed by the sheriff, describing the judgment, the execution, and the property levied upon; and, if the interest levied upon is that of an heir or devisee, specifying that fact, and the name of the heir or devisee. The notice must be recorded and indexed by the clerk, as a notice of the pendency of an action. For that purpose, the judgment debtor, or his heir, or devisee, named in the notice, is regarded as a party to an action. The judgment binds, and becomes a charge upon, the right and title thus levied upon, of the judgment debtor, or of his heir or devisee, as the case may be, only from the time of recording and indexing the notice, and until the execution is set aside, or returned."

Q. A recovered and docketed a judgment against B. While the judgment was in force, B purchased a piece of real estate from C, taking the title thereto in his own name. At the same time, and as a part of the transaction, B gave a mortgage thereon to C, to secure a part of the purchase price. A issues an execution, and claims that his judgment takes precedence over C's mortgage. What are the rights of the parties? State the rule.

A. The purchase money mortgage has priority, according to sec. 1254 of the Code, which is as follows: "Where real property is sold and conveyed, and at the same time, a mortgage thereupon is given by the purchasers, to secure the payment of the whole or a part of the purchase money, the lien of the mortgage, upon that real property, is superior to the lien of a previous judgment against the purchasers."

Q. A was indebted to B in the sum of \$2,000. He transfers to his wife valuable real estate in fraud of his creditors. B then recovers judgment against A, ~~who~~^{and} upon discovering the above facts comes to you for advice. What would you advise are his rights?

A. **B** should issue execution upon his judgment, and when the execution is returned unsatisfied, he may maintain a judgment creditor's action to have the transfer set aside, according to sec. 1871 of the Code, which is as follows: "When an execution against the property of a judgment debtor, issued out of a court of record, as prescribed in the next section, has been returned wholly or partially unsatisfied, the judgment creditor may maintain an action against the judgment debtor, and any other person, to compel the discovery of anything in action, or other property belonging to the judgment debtor, and of any money, thing in action, or other property due to him, or held in trust for him; to prevent the transfer thereof, or the payment or delivery thereof, to him, or to any other person; and to procure satisfaction of the plaintiff's demand, as prescribed in the next section but one." Section 1873 provides: "The final judgment in the action must direct and provide for the satisfaction of the sum due the plaintiff, out of any money, thing in action, or other personal property, belonging to, or due to the judgment debtor, or held in trust for him, which is discovered in the action; whether the same might or might not have been originally taken." See secs. 1874 to 1879, inclusive.

Q. A recovers judgment against B by default, taking an inquest. B thereafter learned that the judgment was pro-

cured by the false testimony of witnesses on the inquest. A brings an action, by way of a creditor's bill to reach certain property of B's in aid of his judgment. B alleges the perjured testimony as a defense to this action. A demurs to the defense. Judgment for whom and why?

A. A's demurrer should be sustained. "It is no defense to a creditor's bill seeking to reach property in aid of a judgment, to allege that upon an inquest on which plaintiff's judgment was obtained, the witnesses testified falsely respecting the value of the goods which were the subject of the action." *Gitler v. Russian Co.*, 124 App. Div. 273.

(NOTE.) "While equity will sometimes intervene to set aside a judgment obtained by fraud or unfair practices, it will not do so where the only fraud alleged is that it was procured by perjured testimony, or for any matter which was actually presented or considered in the judgment assailed. The only frauds for which a judgment can be set aside in an independent action, are those which are extrinsic or collateral to the matter tried by the first court, and not a fraud in the matter on which the decree was rendered." *Mayor, etc., of N. Y. v. Brady*, 115 N. Y. 599.

Q. A received a plurality of votes cast for county clerk, but the board of county canvassers issued a certificate of election to his opponent. A comes to you for advice before his opponent takes office. What are his rights, and what proceedings would you take to enforce them?

A. He can obtain a writ of certiorari to review the action of the board under secs. 2120 et seq. of the Code, or he may pursue the remedy prescribed in sec. 433 of the Election Law (Consolidated Laws, chap. 17) and correct the error of the board by a writ of mandamus. Section 433 of the Election Law provides in part as follows: "The Supreme Court may, upon affidavit presented by any voter, showing that errors have occurred in any statement or determination made by the state board of canvassers, or by any board of county canvassers, or that any such board has failed to act in conformity to law, make an order requiring such board to correct such errors, or perform its duty in the manner prescribed by law, or show

cause why such correction should not be made or such duty performed. If such board shall fail or neglect to make such correction, or perform such duty, or show cause as aforesaid, the court may compel such board, by writ of mandamus, to correct such errors or perform such duty; and if it shall have made its determination and dissolved, to reconvene for the purpose of making such corrections or performing such duty; . . . A special proceeding authorized by this section must be commenced within four months after the statement or determination in which it is claimed that errors have occurred was made, or within four months after it was the duty of the board to act in the particular or particulars as to which it is claimed to have failed to perform its duty." See *Matter of Hart*, 159 N. Y. 278.

Q. A was legally elected to the office of sheriff of his county. B claimed that he was elected, and has taken possession of and is administering the office. A says that he is bound to oust the usurper and obtain possession. How will A enforce his rights, and how are the issues triable?

A. A can have an action brought by the attorney-general on A's relation to oust the usurper under sec. 1948 of the Code, which in part is as follows: "The attorney-general may maintain an action, upon his own information, or upon the complaint of a private person, in either of the following cases: 1. Against a person who usurps, intrudes into, or unlawfully holds or exercises within the state, a franchise, or a public office, civil or military, or an office in a domestic corporation." The issues in such an action are triable as a matter of right by jury. Sections 1949, 1950 of the Code. The title to public office can only be determined by this form of action, and by no other. *People v. Goetting*, 133 N. Y. 569; *People v. Brush*, 146 N. Y. 60. No action by a taxpayer under Gen. Municipal Law can be maintained. *Jewell v. Mohr*, 136 N. Y. Suppl. 273.

(NOTE.) "In certain cases, an action in equity may be maintained, where one person is actually in office and exercising the powers thereof, to restrain another from interfering with the acting official, until the title to the position

can be legally tested, in an action under sec. 1948 of the Code, to prevent unseemly contests out of court of rival claimants to the same place." *Seneca Nation v. Jameson*, 62 Misc. 91.

Q. What is the difference between a writ of certiorari and a writ of mandamus?

A. "The office of a mandamus is to set a ministerial or administrative officer in motion, and to compel him to act, while a writ of certiorari may be resorted to, to review the legality of his act, and if found illegal to set aside or reverse it. The judgment of an officer, court or body charged with judicial functions cannot be coerced by mandamus. The most that can be accomplished by that writ is to compel such officer, court or body to act, leaving the decision to the free exercise of the tribunal charged with the duty of deciding, and reserving to the party affected, the right to review the decision, by certiorari or appeal." *People ex rel. Woodward v. Rosendale*, 76 Hun, 103; *aff'd* 142 N. Y. 126; *People ex rel. Lundgren v. McGuire*, 151 App. Div. 415.

Q. What are the different kinds of mandamus, and define each?

A. "A writ of mandamus is either alternative or peremptory. The alternative writ may be granted upon an affidavit, or other written proof, showing a proper case therefor. Previous notice of the application must be given to a judge of the court, or to the corporation board, or other body, officer, or other person to which or to whom it is directed." Section 2067 of the Code. "A peremptory writ of mandamus may be issued in the first instance, where the applicant's right to the mandamus depends only upon questions of law, and notice of the application had been given to a judge of the court, or to the corporation, board, or other body, officer, or other person, to which or to whom it is directed. . . . Except as prescribed in this section, or by special provision of law, a peremptory mandamus cannot be issued, until an alternative mandamus

has been issued and duly served, and the return day thereof has elapsed." Section 2070 of the Code.

Q. Your client was a member of a mutual benefit association. He was expelled from it by proceedings which were not in accord with the laws of the society. What remedy would you pursue to reinstate him in the society?

A. The remedy is by writ of mandamus. "The expulsion was illegal, and he was entitled to a peremptory writ of mandamus for his reinstatement. The relator was not required to exhaust the means provided in the by-laws for reinstatement before resorting to a mandamus; that these provisions relate to causes of expulsion supported by proceedings lawfully conducted, and where the appeal is to the discretionary power of the society." *People ex rel. v. M. M. P. Union*, 118 N. Y. 101.

Q. In a criminal proceeding, the criminal escaped after trial and pending an appeal. After his escape, his attorney presents to the trial court his case and exceptions for settlement on the appeal. The judge refuses to settle the case, and the attorney applies for a writ of mandamus to compel him to do so. The criminal was not recaptured. What are the prisoner's rights, and will a writ of mandamus lie?

A. A writ of mandamus will not lie, as the prisoner has no rights before the court. "It is essential to any step on behalf of a person charged with a felony, after indictment found, that he should be in custody, either actual, by being confined in jail, or constructive, by being let to bail. An escaped prisoner can take no action before the court." *People v. Genet*, 59 N. Y. 80; *Matter of O'Byrne*, 55 Hun, 438, aff'd 121 N. Y. 675.

Q. What is a writ of certiorari and when can it be used?

A. A writ of certiorari is issued to review the determination of a body or officer. It lies only when no appeal from the decision can be taken to a higher court. Section 2120 of the Code provides that the writ can be issued in one of the following

cases only: 1. Where the right to the writ is expressly conferred, or the issue thereof is expressly authorized, by a statute. 2. Where the writ may be issued at common law, by a court of general jurisdiction, and the right to the writ or the power of the court to issue it, is not expressly taken away by a statute. Section 2121 provides that: "A writ of certiorari cannot be issued, to review a determination, made, after this article takes effect, in a civil action or special proceeding, by a court of record, or a judge of a court of record." Section 2122 provides as follows: "Except as otherwise expressly prescribed by a statute, a writ of certiorari cannot be issued in either of the following cases: 1. To review a determination, which does not finally determine the rights of the parties, with respect to the matter to be reviewed. 2. Where the determination can be adequately reviewed, by an appeal to a court, or to some other body or officer. 3. Where the body or officer, making the determination, is expressly authorized, by statute, to rehear the matter, upon the relator's application; unless the determination to be reviewed was made upon a rehearing, or the time within which the relator can procure a rehearing has elapsed."

Q. Your client has made complaint to the proper authorities of the obstruction of the street, and they have ignored his complaint. What remedy would you pursue?

A. Apply for a writ of mandamus. A citizen has the right to ask for a mandamus to enforce a public right. *People ex rel. v. Keating*, 168 N. Y. 390.

Q. A, who resides in the city of Rochester, is a material witness in an action being tried in the Supreme Court, New York County. B has certain books which are essential to prove certain matters. State what you would do in order to get A and B to testify.

A. Show the original subpoena to the witness and deliver to him a copy of the same and also pay him fifty cents and eight cents for each mile going to the place of attendance. A sub-

poena duces tecum should be served on B, and the fees as above stated should be tendered, and the said subpoena should state the book or books required and which B should bring. See sections 852, 867 and 3318 of the Code.

Q. You find one of your most important witnesses locked up in jail and it is absolutely necessary that you have him as a witness. State how you would proceed.

A. Procure a writ of habeas corpus to testify, according to sec. 2008 of the Code, which is as follows: "A court of record, other than a justice's court of a city, or a judge of such a court, or a justice of the Supreme Court, has power, upon the application of a party to an action or special proceeding, civil or criminal, pending therein, to issue a writ of habeas corpus, for the purpose of bringing before the court, a prisoner detained in a jail or prison, within the state, to testify as a witness in the action or special proceeding, in behalf of the applicant." On habeas corpus generally, see secs. 2008 to 2014, inclusive.

(NOTE.) Section 2015 provides that "A person imprisoned or restrained in his liberty, within the state, for any cause, or upon any pretense, is entitled, except in one of the cases specified in the next section, to a writ of habeas corpus or a writ of certiorari, as prescribed in this article, for the purpose of inquiring into the cause of the imprisonment or restraint, and, in a case prescribed by law, of delivering him therefrom. A writ of habeas corpus may be issued and served under this section, on the first day of the week, commonly called Sunday; but it cannot be made returnable on that day."

Q. A, who is named as co-respondent in an action for divorce, comes to you and wants you to protect his good name, claiming that he is innocent. What would you do?

A. If the co-respondent has not been served with a copy of the summons and complaint, then he has the right to appear in person or by attorney, and demand a copy of the summons and complaint, which must be served by plaintiff's attorney within ten days thereafter, and he may appear to defend such action in so far as the issues affect such co-respondent. Section 1757 of the Code of Civ. Pro. provides for this.

Q. Draw an affidavit of the service of the summons in a divorce action.

A. STATE OF NEW YORK,
CITY AND COUNTY OF NEW YORK, } ss.

John Brown being duly sworn deposes and says that he is twenty-one years of age, and that on the 15th day of March, 1908, at Number 250 Fifth Avenue, in the city of New York, he personally served the annexed summons on May Smith, the defendant herein named, by delivering a copy to her personally, and leaving the same with her, and that he knew the person so served to be the person mentioned and described in said summons as defendant.

The summons so served on the defendant, as aforesaid, had at the time of such service, the words "action for a divorce" legibly written upon the face thereof.

That deponent knows said May Smith to be the said defendant and the proper person to be served with said summons, as he has known the said defendant for the past five years and often visited the said defendant at Number 250 Fifth Avenue, where she lived with her husband, the plaintiff in this action.

JOHN BROWN.

Sworn to before me this
15th day of March, 1908.

RICHARD GRAY,
Notary Public,
New York County.

Q. In an action between A and B, the jury delivered a sealed verdict for the plaintiff, and failed to specify any amount. The plaintiff's attorney made a motion to have the amount sued for, entered in the judgment. The amount sued for was the only amount plaintiff would be entitled to recover, either that or nothing. The court granted the motion. Defendant appeals. Who wins?

A. Plaintiff. The court has the power on motion, to amend a verdict by putting in the amount, where the jury rendered

a verdict for the plaintiff. *Dalrymple v. Williams*, 63 N. Y. 361; *Hodgkins v. Mead*, 119 N. Y. 166; *Wirt v. Reid*, 138 App. Div. 761. "There can be no question, that where a verdict as recorded, does not correctly embody the finding of the jury, the trial court has power, after due notice to all parties affected by the verdict, and the judgment to be entered thereon, to order a correction of the verdict so as to conform with the actual finding of the jury." *Band v. Bindseil*, 78 Misc. 161.

Q. A brings an action against B. The jury brings in a verdict for A. One hour thereafter B dies. Against whom should you enter judgment?

A. Judgment should be entered in the names of the original parties, that is, A against B. Section 763 of the Code provides for this, and is as follows: "If either party to an action dies, after an accepted offer to allow judgment to be taken, or after a verdict, report, or decision, or an interlocutory judgment, but before final judgment is entered, the court must enter final judgment, in the names of the original parties; unless the offer, verdict, report, or decision, or the interlocutory judgment, is set aside."

Q. A brings an action against the Inter. City R. T. Co., to recover damages for personal injuries sustained by defendant's negligence, alleging in his complaint permanent injuries. The R. R. Co., in its answer, denies the negligence, and also denies that it has any knowledge of the nature or extent of A's injuries. The attorneys for the R. R. Co., before the trial, on affidavits setting forth the facts, make a motion for an order requiring A to submit to a physical examination as to the injuries alleged to have been sustained, by a physician. A's attorney on the argument of the motion claims that the court has no power to grant such an order. What should be the decision of the court?

A. The order should be granted. The power to grant such orders is expressly given by sec. 873 of the Code which in part

is as follows: "In every action to recover damages for personal injuries, the court or judge, in granting an order for the examination of the plaintiff before trial may, if the defendant apply therefor, direct that the plaintiff submit to a physical examination by one or more physicians or surgeons, to be designated by the court or judge, and such examination shall be had and made under such restrictions and directions as to the court or judge shall seem proper. In any action brought to recover damages for personal injuries, where the defendant shall present to the court or judge satisfactory evidence that he is ignorant of the nature and extent of the injuries complained of, the court or judge shall order that such physical examination be made; and if the party to be examined shall be a female she shall be entitled to have such examination before physicians or surgeons of her own sex."

Q. A did all the carpenter work for the X Club, an unincorporated association, composed of about fifty members. The club has not paid A for his work, and he comes to you. How and against whom would you sue?

A. Bring an action against the president or treasurer of the club; if judgment is obtained, it must be satisfied out of the property belonging to the association. This is provided for by secs. 1919 et seq of the Code.

Q. You are requested to begin an action by the service of a summons only, to recover a penalty given by statute. Draw the summons in proper form to be served on the defendant.

A. The summons is in the usual form provided for by sec. 418 of the Code (see form on first page of this chapter) except that the summons must be indorsed with a reference to the statute. This is provided for in sec. 1897 of the Code as follows: "In an action to recover a penalty or forfeiture, given by a statute, if a copy of the complaint is not delivered to the defendant with a copy of the summons, a general reference to the statute must be indorsed upon the copy of the summons

so delivered, in the following form: "According to the provisions of," etc.; adding such a description of the statute, as will identify it with convenient certainty, and also specifying the section, if penalties or forfeitures are given, in different sections thereof, for different acts or omissions."

Q. A is induced to deal with B to his damage, by means of B's false representation. He brings suit on contract for damages, but afterwards discontinues the action and sues in fraud and deceit. B interposes a demurrer to the second suit. Judgment for whom and why?

A. Judgment for B. A, having with knowledge of the fraud, brought an action on contract, thereby elected to affirm the contract, and he could not thereafter repudiate it and sue in tort. He is bound by his election of remedies. Where one has two remedies, and he elects to pursue one, he cannot thereafter follow the other. "Where a party takes legal steps to enforce a contract, this is a conclusive election not to rescind on account of anything then known to him." *Conrow v. Little*, 115 N. Y. 387. The doctrine is well settled that where there exists an election between inconsistent remedies the party is confined to the remedy which he first prefers and adopts. By bringing one action he waives his right to bring the other. *Morris v. Rexford*, 18 N. Y. 552; *Strong v. Strong*, 102 N. Y. 69; *Fowler v. Bowery Savings Bank*, 113 N. Y. 450.

Q. A brings an action against B for conversion of property. Judgment against A on the ground that it was a sale. Can A thereafter maintain an action for the value of the property?

A. Yes. "The institution by a party of a fruitless action, which he has not the right to maintain, will not preclude him from asserting the right he really possesses. Defendants, by their contention, succeeded in establishing that there was an absolute sale, and that therefore plaintiff had mistaken his remedy, and they cannot now set up the judgment which they then obtained, to prevent the plaintiff from recovering the

purchase price of the property, which they formerly urged and established was sold to them by him, and which it is conceded they have not paid for, and thus not only retain the property but also the purchase price. Plaintiff here did not make an election of remedies; he simply made a mistake as to what his remedy was. There must be two remedies from which to elect. It is not enough that he supposed that he had two remedies, he must have them in fact." *McNutt v. Hilkins*, 80 Hun, 235.

Q. A wrongfully took and converted to his own use, the horse of B valued at \$100. B sues A on contract for goods sold and delivered. The above facts were shown on the trial, and the defendant moved for a dismissal. Ruling and reasons.

A. Judgment for B. "The owner of personal property which has been wrongfully converted by another, may, although the property is retained by the wrongdoer, waive the tort, and sue for and recover its value as upon an implied contract of sale." *Terry v. Munger*, 121 N. Y. 161.

Q. A and B wrongfully take a carriage belonging to C. C brings an action on an implied contract to recover its value. He recovers judgment and issues execution, but the same is returned unsatisfied. He then discovers that the carriage is in the possession of D, having been bought from B. He brings an action of replevin against D. Judgment for whom and why?

A. Judgment for D. By bringing an action on contract, C elected to treat the transaction as a sale, and the title thereby passed to the wrongdoers; therefore the wrongdoers could pass a good title, and C must therefore fail in his action of replevin against D. *Terry v. Munger*, supra; *Wise v. Grant*, 140 N. Y. 593.

Q. A disobeyed an injunction order which was granted erroneously. He is brought up for contempt proceedings. Can he be punished for disobeying the injunction order?

A. Yes. "A party who disobeys an injunction, although erroneous, is guilty of contempt. It must be void upon its face for utter lack of jurisdiction, to entitle a party to disobey an injunction." *People ex rel. Kauffman v. VanBuren*, 136 N. Y. 252.

Q. A justice of the peace is about to take certain action beyond his jurisdiction, which will be prejudicial to your client. You desire to prevent the action being taken. What proceedings would you take?

A. Apply for a writ of prohibition. This writ is used to arrest judicial action. It is a writ directed to some inferior court restraining an abuse of jurisdiction. "A writ of prohibition is to prevent the exercise by a tribunal possessing judicial powers, of jurisdiction over matters not within its cognizance or exceeding its jurisdiction in matters of which it has cognizance. It will not lie to restrain a ministerial act. *Ex parte Brandlacht*, 2 Hill, 367; *People v. Supervisors of Queens*, 1 Hill, 195. It is a proper remedy when the inferior court either entertains a proceeding in which it has no jurisdiction, or when having jurisdiction, it assumes to exercise an unauthorized power." Allen, J., in *Thompson v. Tracy*, 60 N. Y. 31.

(NOTE.) "Where there is a remedy by appeal or otherwise to correct an error of law or practice, a writ of prohibition does not lie. In such case the inferior court or tribunal of limited jurisdiction can be set right only by appeal. Where, however, a statute imposes restrictions as to the circumstances in which an inferior court or judge thereof may act in matters otherwise within its jurisdiction, and these restrictions are disregarded, the party aggrieved may, in the discretion of the court, be entitled to a writ of prohibition." *People ex rel. v. Special Term*, 145 App. Div. 530. See also generally secs. 2091 and 2094 of the Code. *People ex rel. v. Nichols*, 79 N. Y. 582; *People ex rel. Hummel v. Trial Term*, 184 N. Y. 30.

Q. A's complaint, in an action against a Railroad Company, set forth two independent causes of action which were separately pleaded. The company in its answer joined issue in both causes of action. At the trial the judge directed the

jury to find a verdict for the Railroad Company, on the first count. The jury found a verdict for A, on the second count, for sixty dollars. Who should be awarded costs?

A. Each party had "recovered" and was therefore entitled to costs as against the other under sec. 3234 of the Code, and it was so held in *Browning v. R. R. Co.*, 64 Hun, 513. Section 3234 of the Code provides in part as follows: "In an action, . . . wherein the complaint sets forth separately two or more causes of action, upon which issues of fact are joined, if the plaintiff recovers upon one or more of the issues, and the defendant upon the other, or others, each party is entitled to costs against the adverse party, unless it is certified that the substantial cause of action was the same upon each issue; in which case, the plaintiff only is entitled to costs. Costs, to which a party is so entitled, must be included in the final judgment, by adding them to, or offsetting them against, the sum awarded to the prevailing party; or otherwise, as the case requires." See generally as to costs secs. 3228 et seq.

CHAPTER XXI

Evidence

Q. What is meant by the term of "burden of proof"? A makes a contract for work, labor and services. Upon B's failure to pay, A brings suit against him. B answers denying any contract. Upon whom does the burden of proof rest? Who has the right to open and close? If B had answered admitting the contract but pleading payment, who would have the burden?

A. The term "burden of proof" is used in two senses, one as denoting the burden of establishing a given proposition, the other as denoting the burden of going forward in support of a given proposition. By the first is meant the duty of establishing one's case. The usual test given as to who has this duty or burden is, that it rests upon the party against whom judgment would be given if no evidence were offered by either side. In the first question put, the burden of establishing is upon A, he affirming that there is a contract, and B denying the same. The burden of establishing, and the right to open and close are coincident with each other. In the second case, B having admitted that there is a contract, and setting up payment, an affirmative defense, there is no issue as to the contract, and hence B has the burden of establishing payment, it being the only question in controversy. The burden of establishing never shifts, although the burden of going forward with evidence shifts from side to side, according as the weight of evidence preponderates. "Where the party having the burden of proof establishes a *prima facie* case, and no proof to the contrary is offered, he will prevail. Therefore the other party, if he would avoid the effect of such *prima facie* case, must produce evidence of equal or greater weight to balance and control it, or he will fail. Still the proof on both sides applies to

the affirmative or negative of one and the same issue or proposition of fact; and the party whose case requires the proof of that fact has all along the burden of proof. It does not shift, though the weight in either scale may at times preponderate. But where the party having the burden of proof, gives competent and prima facie evidence of a fact, and the adverse party, instead of producing proof which would go to negative the same proposition of fact, proposes to show another and a distinct proposition which avoids the effect of it, then the burden of proof shifts, and rests upon the party proposing to show the latter fact." *Powers v. Russell*, 13 Pick. 69. See also *Thayer's Cases on Ev.*, note on Burden of Proof.

Q. A is on trial for murder. The judge in his charge to the jury instructs them, that the people must establish their case by a preponderance of evidence, and if they fail so to do, the prisoner must be acquitted; that if the people establish the killing by the defendant, he must show that it was justifiable or excusable, or else be convicted of murder. What do you say to this charge?

A. The charge was clearly erroneous. While in civil cases, the plaintiff need only establish his case by a preponderance of evidence, yet in criminal cases, the duty is upon the people to establish the guilt of the prisoner beyond a reasonable doubt. There is no legal implication from the fact of the killing. The burden of establishing rests upon the people throughout the trial; it never shifts to the prisoner; his only duty throughout is to raise a reasonable doubt. "The charge in this case ran counter to these rules, and was calculated to impress upon the jury a belief that proof of the homicide carried with it a legal implication of crime which shifted the burden of proof upon the prisoner, and required him to satisfy the jury, that the killing was either justifiable or excusable at the peril of a conviction if he should fail in his attempt. It is true, that while there is no legal implication of the crime of murder from the bare fact of a homicide, the jury may infer it as a fact, and may do so even though no motive is assigned for the act, and the case is

bare of circumstances of explanation. But the inference is one of fact which the jury must draw, if such seems to be their duty, and not one of law which the court may impose upon their deliberations, and then upon that assumption, shift the burden upon the prisoner and require him to prove that in fact no crime has been committed." *People v. Downs*, 123 N. Y. 558; *People v. Conrow*, 97 N. Y. 77.

Q. A is on trial for murder. He interposes the defense of insanity. The court instructs the jury that in order to acquit the prisoner, the evidence offered on his part must satisfy them that he was insane at the time of the killing; that he must prove insanity by a preponderance of evidence. A is convicted. He appeals on the ground that the charge was improper. Is the appeal good?

A. Yes. The prisoner has no duty to establish any defense, such as insanity by a preponderance. It is true, that he has the burden of going forward with evidence of insanity, but not the burden of establishing the same. It is never incumbent on the prosecution to give affirmative evidence of sanity in a particular case, yet the burden is upon it to establish beyond a reasonable doubt that the crime was committed by a sane person. After the prisoner has given evidence to show that he was insane when the alleged crime was committed the prosecution may produce evidence to show that he was sane, and if the entire evidence does not satisfy the jury of the prisoner's sanity beyond a reasonable doubt, he must be acquitted. *People v. McCann*, 16 N. Y. 58; *O'Connell v. People*, 87 N. Y. 377; *Walker v. People*, 88 N. Y. 81; *People v. Mino*, 149 N. Y. 317. "When the defendant has given evidence to show that at the time he committed the homicide he was insane, the prosecution must prove his sanity at that time, not only by a preponderance of evidence, but his sanity must be proved beyond a reasonable doubt." *People v. Egnor*, 175 N. Y. 419.

Q. On the trial of A for murder he offers the plea of self-defense. The judge instructs the jury that the prisoner must

establish his plea by a preponderance of evidence. After A is convicted, his counsel having excepted, appeals. What should the decision be on appeal?

A. The judgment must be reversed as the charge was error. The rule in criminal cases, that the defendant is entitled to the benefit of a reasonable doubt, applies not only to the case as made by the prosecution, but to any defense interposed. *People v. Riordan*, 117 N. Y. 71. "The burden is upon the prosecution throughout the trial to establish the crime charged beyond a reasonable doubt, and if upon the whole case, including the testimony on behalf of the prosecution and on behalf of the defendant, a reasonable doubt of the defendant's guilt arises, the jury must acquit. A defendant in a criminal case, who interposes the plea of self-defense is not obliged to establish it by a preponderance of evidence." *People v. Shanley*, 49 App. Div. 56.

Q. A offers a will for probate. It is contested on the ground of the insanity of the testator. On whom is the burden of establishing the sanity of the testator? On whom is the burden of going forward with evidence on the question of sanity?

A. The burden of establishing that the will was the act of a competent testator is upon the proponent. But as the law presumes that everyone is of sound mind, he is relieved by this presumption from going forward with evidence. The proponent need only prove the due formal execution of the will, and then it is opened to the contestant to show incapacity, and to the proponent to offer affirmative proof of mental soundness in rebuttal. Taking the proceedings for probate as a whole, the proponent must throughout see to it that the preponderance of evidence is in favor of the presumption, and such as will satisfy the court in assuming the requisite soundness of mind. *Dellafield v. Parish*, 25 N. Y. 9; *Tyler v. Gardiner*, 35 N. Y. 559; *Matter of Flansburgh*, 82 Hun, 49.

Q. A was on trial for larceny, and offered testimony as to his good character. The prosecuting attorney asked the court

to charge the jury "that if it was satisfied that the testimony in the case pointed conclusively to the guilt of the prisoner, that the evidence of his previous good character would be of no avail." How should the court charge? Give reasons.

A. The court should refuse to charge as requested. Proof of good character, will sometimes of itself create a doubt when without it none would exist. *People v. Elliott*, 163 N. Y. 11; *People v. Bonier*, 179 N. Y. 315; *People v. Pekarz*, 185 N. Y. 470.

Q. A leaves home in 1900, and is not heard of for more than ten years. His property is claimed by both B and C. It becomes important for B to establish that A died in 1902. At the trial of an action for the possession of A's property, B offers evidence of A's unexplained absence and rests. C moves for judgment. Judgment for whom and why?

A. Judgment for C. The rule is, that where a person goes abroad and is not heard of for seven years, the law presumes the fact that such person is dead, but not that he died at the beginning or at the end of any particular period during those seven years; that if it be important to anyone to establish the precise time of such person's death, he must do so by evidence of some sort to be laid before the court for that purpose, beyond the mere lapse of seven years since such person was last heard of. The presumption of law relates only to the fact of death, and the time of death whenever it is material, must be the subject of distinct proof. If no sufficient facts are shown from which to draw a reasonable inference, that death occurred before the lapse of seven years, the person will be accounted in all legal proceedings as having lived during that period. *Eagle v. Emmett*, 4 Bradf. (N. Y.) 117; *Matter of Davenport*, 37 Misc. 455. "The presumption of death applies as to an unexplained and continued disappearance for more than seven years the same as to an established departure and absence unheard of by those, if any, likely to hear. The presumption of death does not necessarily fix the exact time of death." *Matter*

of Smith, 77 Misc. 76. "The general rule that an absentee, who has not been heard of for seven years, may be presumed to be dead at the expiration of the seven years for the purpose of distributing an estate is well settled. (Jackson v. Claw, 18 Johns. 347; Matter of Sullivan, 51 Hun, 378; Barson v. Mulligan, 191 N. Y. 324.) Circumstances may justify a finding of death before, or they may be such as to give right to no presumption either at or after the expiration of seven years. Each case must necessarily depend upon its own facts. When the failure of the absentee to communicate with his friends is satisfactorily accounted for on some other hypothesis than that of death, or where no inquiry has been directed to the place where he was last known to be, as in Dunn v. Travis, 56 App. Div. 317, no presumption arises. Rights are not to be held in abeyance indefinitely on account of the absence of a person of whom no trace can be found. He may not be dead, but he will be presumed to be dead for the purpose of fixing the rights of those known to be living." Miller, J., in Matter of Wagner, 143 App. Div. 287.

Q. A, B and C, husband, wife and child, were stopping at a certain hotel which was destroyed by fire. They all three perished in the flames. On the trial of an action, it becomes material to prove that A, the husband, survived the others. The attorney for one of the parties contends that the husband, being the stronger, survived, and offers no evidence. Is this contention valid? State your reasons.

A. No. There is no presumption of survivorship in this state, either that anyone survived the other, or which one was the survivor. "There is no legal presumption which courts are authorized to act upon, that there was a survivor, any more than that there was a particular survivor. It is not claimed that there is any legal presumption that they died at the same time. Indeed it may be conceded, that it is unlikely that they ceased to breathe precisely at the same instant, and as a physical fact it may perhaps be inferred that they did not. But this does not come up to the standard of proof. The

rule is, that the law will indulge in no presumption on the subject. It will not raise a presumption by balancing probabilities, either that there was a survivor, or who it was. . . . These expressions only mean that as the fact is incapable of proof, the one upon whom the onus lies, fails, and persons thus perishing must be deemed to have died at the same time for the purpose of disposing of their property." Church, Ch. J., in *Newell v. Nichols*, 75 N. Y. 78. See also *Dunn v. N. A. Cas. Co.*, 141 App. Div. 479; *St. John v. Andrews Inst.*, 191 N. Y. 276; *Matter of Herrmann*, 75 Misc. 601.

Q. In an action to recover damages for an assault committed upon the plaintiff, the defendant requested the court to charge the jury that he was presumed to be innocent until his guilt was established by the plaintiff. The court refused to so charge, and the defendant excepts. The jury found for the plaintiff, and the defendant appeals on the ground of the judge's refusal to charge as requested. What should the decision be on appeal?

A. The appeal should be dismissed, as there is no presumption in civil cases; the presumption applies only to criminal cases. "We are of opinion that the trial judge committed no error in refusing to charge that the defendant is presumed innocent until he is proven guilty. The presumption of innocence is not indulged in a civil action, as the plaintiff rests only under the burden of proving his case by a preponderance of evidence. We deem it very important that the strict rule of evidence applicable to the burden of proof in criminal cases, should not be extended to civil actions for the recovery of damages. When life or liberty is involved the proof must exclude reasonable doubt, but in a civil action, where a recovery of damages is sought against the wrongdoer, the plaintiff is only required to sustain his case by a preponderance of evidence." Bartlett, J., in *Kurz v. Doerr*, 180 N. Y. 89, 91, 92. See also *Wood v. Wyeth*, 106 App. Div. 24; *Johnson Co. v. Maclernon*, 142 App. Div. 679.

Q. A sues an insurance company. On the trial of the action, the attorney for the company admits that B, who A claims

signed his policy, was the agent of the company. A recovers judgment, and the insurance company appeals. The judgment is reversed and a new trial ordered. On the new trial, the insurance company is represented by another attorney, and he objects to receiving the admission made on the first trial by the previous attorney for the company. The court overrules the objection. Was the ruling correct? State your reasons.

A. Yes. The admission was binding on the company throughout the litigation. "A written stipulation with respect to the facts in a case made by the parties or their attorneys for the purpose of evidence, if it is general and not expressly limited in respect to time, or confined in terms to some particular purpose or occasion, stands in the case for all purposes until the litigation is ended, unless the court upon application shall relieve either or both of the parties from its operation." *Clason v. Baldwin*, 152 N. Y. 204; *Cosverse v. Sickles*, 16 App. Div. 49, *aff'd* in 161 N. Y. 666; *Fortunato v. Mayor*, 74 App. Div. 441, *aff'd* 173 N. Y. 608; *Steumler v. Mayor*, 179 N. Y. 482. "But when facts stipulated by the plaintiff at a former trial solely for the accommodation of the defendant turn out to be untrue or very doubtful, the court in equity should relieve the plaintiff from the stipulation." *Donovan v. Twist*, 119 App. Div. 734.

(NOTE.) "In our law, the term 'admission' is usually applied to civil transactions, and to those matters of fact in criminal cases which do not involve criminal intent; the term 'confession' being generally restricted to acknowledgment of guilt. . . . We shall first consider the person whose admission may be received. And here the general doctrine is, that the declarations of a party to the record, or of one identified in interest with him, are, as against such party, admissible in evidence." *Greenleaf on Evidence*, secs. 169, 171.

Q. A brings an action of trespass against B. On the trial of the action, B offers in evidence an admission of C, a former owner of the land, to the effect that B had certain rights therein, which would defeat A's action. The evidence was objected to. What should have been the ruling of the court?

A. The evidence was admissible. Declarations of former owners of real estate are admissible in evidence as against subsequent grantees, on the ground of identity of interest. *Jackson v. Shearman*, 6 Johns. 19; *Chadwick v. Fonner*, 69 N. Y. 404; *Lyon v. Ricker*, 141 N. Y. 225; *N. Y. Water Co. v. Crow*, 110 App. Div. 32.

Q. A brought an action against B to recover the amount of a promissory note made by B payable to C's order. On the trial, certain declarations alleged to have been made by C while he was the owner of the note, were offered in evidence. Objected to. Should the objection be sustained? State your reasons.

A. Yes. The evidence is not admissible. In this state, after some uncertainty as to the rule, it was decided in the early case of *Paige v. Cagwin*, 7 Hill, 361, that such admissions in controversies about personal property are not admissible. But in controversies as to real property, the rule remains as above stated. "It will be found, on an examination of most of them, that they do not sustain the doctrine that the declarations of a prior holder of a note, or vendor of a chattel, are admissible in evidence as against a subsequent owner, who acquired title for a valuable consideration. It may, I think, be laid down as a general proposition, that the cases in which such evidence has been held admissible, are those only where the declarations were made by a party really in interest, or by one through whom the plaintiff claimed as privy through representation, as in cases of bankruptcy, death and others of a similar character. Where the rule is applicable, there must, it is conceded, be an 'identity of interest' between the assignor and assignee. That relation appears to me to be based on the fact, that the rights of the assignor continue and are represented by the assignee. Where a person becomes a purchaser of a chose in action or a chattel for a valuable consideration, his rights are independent of the assignor and beyond his control. Although it may be necessary to found his title on a transfer, yet the mere proof of such transfer is evidence of his right. Personal property is frequently acquired by delivery merely.

Possession alone is then *prima facie* evidence of title, and the rights of the possessor do not necessarily depend on the title of the person by whom the delivery was made, or from whom such possession was obtained." Lott, S., in *Paige v. Cagwin*, 7 Hill, 361, a leading case followed in *Booth v. Swezy*, 8 N. Y. 279; *Tonsley v. Barry*, 16 N. Y. 500; *Foster v. Beals*, 21 N. Y. 247; *Flannery v. Van Tassell*, 127 N. Y. 631.

Q. A, the assignee of a mortgage on real estate, brings an action in foreclosure against B, the present owner of the property. At the trial, B offers as evidence the declarations of A's assignor (C) as to matters which would constitute a defense to the action. Objection is made. What should be the ruling of the court?

A. Objection should be sustained. "While an assignee for value of a mortgage takes it subject to the equities existing between the original parties, they must be established by common law evidence; and the declarations of the assignor made prior to the assignment, are inadmissible against the assignee to establish a defense to an action brought by him to foreclose the mortgage." *Merkle v. Beidleman*, 165 N. Y. 21.

Q. When the will of A is offered for probate, it is contested by B on the ground of undue influence. B offers evidence to show that C, one of the legatees, made declarations to the effect that he, C, unduly influenced A in making the will. This is objected to by the other legatees. What should be the ruling of the court? Give reasons.

A. The evidence is inadmissible. A declaration or admission made by one of several legatees is not competent as against the other legatees in a proceeding to contest a will, unless it appears that the several legatees were either jointly interested or had conspired together. "It seems to me that the weight of authority is against the admissibility of the declarations of one party to affect the rights of another, unless such parties be jointly interested, by which each party is authorized to

speaking and acting for the whole, or there is proof of a combination, in which case, a conspirator may speak for all his confederates. But in the latter case, a conspirator, by his admissions or declarations can only affect his coconspirators, and if his admissions or declarations cannot but affect other parties not confederated, such admissions or declarations should be excluded. This rule is based upon the most obvious principle of justice. Is there any good reason to be suggested why the rights of one party should be affected by the irresponsible admissions of another party with whom he chances to be associated as such, but upon whom he has conferred no authority to speak for him? Such a principle would enable a party to deprive another of his legal rights without that other being able either to disprove the admission, or by cross-examination to test their truth. It is true that the admissions of a party adverse to his interest are held admissible, because of the improbability of a person admitting a fact contrary to his interest, unless such admission be true; and there seems to be a propriety in holding such a party bound by his own admission, but when the interest of another party intervenes, that other party has the right to insist that they shall not be divested, except by ordinary proof attested by the sanction of an oath, by his own voluntary admissions." Calvin, S., in *La Bau v. Vanderbilt*, 3 Redf. (N. Y.) 384. See also *Matter of Baird*, 47 Hun, 78; *Naul v. Naul*, 75 App. Div. 294; *Matter of Kennedy*, 167 N. Y. 163; *Matter of Myer*, 184 N. Y. 54.

Q. Father and son are standing together when plaintiff sells his goods. Nothing is said at the time of the responsibility of either. Plaintiff sues the father, and attempts to show that: 1. The son is irresponsible. 2. Father has paid debts of this kind for the son. Can he show either or both?

A. He cannot show either. "In an action where the question at issue was whether credit was given to the defendant or his son, evidence on the part of the plaintiff of the pecuniary inability of the son was received under objection. Held error, that no fair inference could be drawn that defendant re-

ceived the credit because he happened to have the most property. So also the reception of evidence that defendant had paid debts of other persons against his son held error, as the facts of such payments were no evidence of a promise to pay other debts." *Green v. Disbrow*, 56 N. Y. 334. See also *Duryea v. Vosburgh*, 121 N. Y. 57; *McLoghlin v. Bank*, 139 N. Y. 514; *Trombley v. Seligman*, 191 N. Y. 402.

Q. A and B, adjoining owners, were damaged by C's negligence in allowing the cinders of a furnace to escape and burn their timber. Both A and B claimed that C's negligence was the cause of their injury, and demanded damages against him. C compromised with A for \$200, without a lawsuit, and offered a settlement to B, but thereafter refused to do so. B thereupon brought action against C, basing his claim on the aforesaid negligence, which C denied. On the trial B offered to prove C's settlement with A and the offer of settlement with him, as an admission of his (C's) liability. C objects to the evidence. What should be the decision of the court and why?

A. The evidence should be excluded. "The first was in violation of the familiar rule that negotiations or propositions looking to the settlement of a controversy without action cannot be given in evidence as admissions of liability. The rule is well founded in reason. The law is willing to encourage the compromise and settlement of controversies without litigation, and holds communications looking to that end as privileged in their character, and not to be used to the prejudice of the party making them. It is true that the privilege does not extend to the admission of a disputed fact, even though made in the course of such negotiations; but this does not detract from the force of the rule. The principle is that an offer or consent, or expression of willingness to settle, is not to be taken as an admission of liability, and is, therefore, not evidence of the fact. The testimony objected to was within the rule. There was in it no admission of any fact in controversy, but only the expression of a desire that the matter might be settled. The same rule should, a fortiori, have excluded the testimony ob-

jected to, of the fact of a settlement without litigation, of the claim of another neighbor for damage done by the same fire. What motives or considerations may have influenced the defendant to make that settlement does not appear. The fact that he did settle with a third person was not to be taken as an admission of his liability, for the same reason that his proposition to settle with the plaintiff was not to have that effect." *Slingerland v. Norton*, 58 Hun, 579. See also *Tennant v. Dudley*, 144 N. Y. 504.

Q. On the trial of an action which A brought against B to recover an indebtedness for services rendered, the following letter is offered in evidence by his attorney. The letter was written some time after the commencement of the action. The letter follows: To A—Yours of the 14th inst. to hand and contents noted. To save cost and stop further litigation we are willing to send you our check for \$50 in full liquidation of your claim. Signed B. B's attorney objects to the admission of the letter in evidence. How should the court rule?

A. The objection must be sustained because the letter does not contain an admission of a fact, but rather an offer of compromise, made for the purpose of procuring a settlement of a pending controversy, and hence is not competent. *Laurence v. Hopkins*, 13 Johns. 288; *Warner v. Richmond*, 3 Denio, 58; *Smith v. Satterlee*, 130 N. Y. 677.

Q. A sues B and C for a tort committed by them. At the trial, he offers in evidence an admission of B. C objects to its reception in evidence. What should be the ruling of the court? State your reasons.

A. The objection should be sustained, as the admissions of one joint tortfeasor cannot be used against the other. The law does not recognize a sufficient identity of interest between them, to permit the admissions of one to bind the other, unless prima facie evidence of a conspiracy between all of them has been introduced. *Carpenter v. Sheldon*, 5 Sandf. 77; *Wilson v.*

O'Day, 5 Daly, 354; Cuyler v. McCartney, 40 N. Y. 221; Bennett v. McGuire, 58 Barb. 637.

Q. An action was brought to recover for certain lumber used in the construction of a station. Evidence was introduced to show that B, the contractor of the defendant, purchased the lumber. This was objected to on the ground that there was no testimony showing that B had authority to purchase the lumber in question. Plaintiff then offered to show that defendant had paid for other lumber purchased by B, to which the defendant objected. What should the court do?

A. The court should admit the evidence that defendant has paid for lumber purchased by B, as it is relevant and shows that B had authority to purchase the lumber in question. B's authority to act for the defendant was in issue, it could be established by circumstances, and among others the recognition by the defendant of acts on his part similar in character to those in controversy. *Olcott v. R. R.*, 27 N. Y. 560; *Beattie v. R. R. Co.*, 90 N. Y. 643.

Q. A is arrested charged with having committed a murder. He makes a full confession to an officer who visits him in prison. On the trial it is offered in evidence against him. A's attorney objects, claiming that it is not admissible as he was under arrest. It is conceded that the officer used no threats or promises to secure the confession. What should be the ruling of the court?

A. The objection should be overruled. It is no ground for the exclusion of confessions of prisoners charged with crime, that they were made while under arrest, if shown that they were made voluntarily, and without influences of promises or threats. *People v. McGloin*, 91 N. Y. 240; *People v. Chapleau*, 121 N. Y. 266; *People v. Kennedy*, 159 N. Y. 346; *People v. Cassidy*, 133 N. Y. 612; *People v. White*, 176 N. Y. 349. Section 395 of the Code of Crim. Pro., governing the admissibility of confessions is as follows: "A confession of a defendant, whether in the course of judicial proceedings or to a private

person, can be given in evidence against him unless made under the influence of fear produced by threats, or unless made upon a stipulation of the district attorney that he shall not be prosecuted therefor; but is not sufficient to warrant his conviction without additional proof that the crime charged has been committed."

(NOTE.) "Where in a criminal prosecution a paper alleged to be a written confession by the defendant is offered in evidence against him and he objects to its admission and offers to prove at that stage of the trial that the paper was procured from him by such threat or promises or under such circumstances as, if established, would render it inadmissible, it is the duty of the trial judge to receive the evidence thus offered against the admissibility of the alleged confession before deciding as to the competency of the confession itself; and it is error to admit the paper without first receiving and considering such evidence." *People v. Fox*, 121 N. Y. 449; *People v. Rogers*, 192 N. Y. 331.

Q. A coroner's inquest is being held to inquire into the cause of the death of A. B is subpoenaed as a witness and gives certain testimony. He is subsequently arrested and charged with having murdered A. On his trial, the district attorney attempts to introduce in evidence B's testimony given before the coroner. It is objected to. What should be the ruling of the court?

A. The objection should be overruled as the evidence is admissible. "Where an inquest is being held before it has been ascertained that a crime has been committed, or before any person has been arrested charged with the crime, and a witness is sworn before a coroner's jury, the testimony, though the witness be afterward charged with the crime, may be used against him on his trial, notwithstanding the fact, that at the time of the examination he was aware a crime was committed, and that he was suspected of being the criminal. If he desires protection, he must claim his privilege. It would have been different if he had been arrested before being taken before the coroner; in such case the evidence given by him could not be used against him on his trial for the crime. As a person under arrest before a coroner's jury and accused of having committed

a crime occupies before the coroner and jury a position similar to that of such a person before an examining magistrate, and therefore evidence given by him before the coroner except where taken as prescribed by secs. 188, 196, 198, of the Code of Crim. Pro., cannot be used against him upon his trial for the crime." *Hendrickson v. People*, 10 N. Y. 13; *People v. McMahon*, 15 N. Y. 384; *Teachout v. People*, 41 N. Y. 7; *People v. Mondon*, 103 N. Y. 211. The testimony must be voluntarily given after he has been fully advised of all his rights and has been given an opportunity to avail himself of them, when under arrest. The distinction must be drawn between one who testifies as a witness and one who testifies as a party. If the person who testifies at the inquest does so simply as a witness he has none of the rights or immunities of a party. If he testifies, however, as an accused or arrested party, his testimony cannot be used against him upon a subsequent trial of an indictment growing out of the inquest, unless he was informed of his rights, that is, he must be informed of the charge and of his right to the aid of counsel. But testifying as a witness the testimony can be used against him, for the law presumes that a person who is called upon to testify as a mere witness knows his rights. He may decline to testify to anything that may tend to incriminate him. If he does not claim his privilege he cannot thereafter complain. *People v. Molineux*, 168 N. Y. 331; *People v. Brown*, 203 N. Y. 48.

Q. A who is a tenant of a certain building brings action against the owner to recover damages for personal injuries caused by falling down the stairs which were in an unsafe and defective condition. At the trial, A's attorney offers to show that three days after the accident the owner made certain repairs to the stairs. This is objected to. What should be the ruling of the court?

A. The objection should be sustained. It is well settled in this state that such evidence is incompetent, because the taking of such precautions against the future is not to be con-

strued as an admission of responsibility for the past, has no legitimate tendency to proof that the defendant has been negligent before the accident happened, and is calculated to distract the minds of the jury from the real issue, and to create a prejudice against the defendant. "Such evidence has no tendency whatever, we think, to show that the machine or structure was not previously in a reasonably safe and perfect condition, or that the defendant ought, in the exercise of reasonable care and diligence, to have made it perfect, safe and secure. While such evidence has no legitimate bearing upon the defendant's negligence or knowledge, its natural tendency is undoubtedly to prejudice and influence the minds of the jury." *Corcoran v. Village of Peekskill*, 108 N. Y. 151. See also *Getty v. Town of Hamlin*, 127 N. Y. 636; *Clapper v. Town of Waterford*, 131 N. Y. 382; *Causa v. Keeney*, 156 App. Div. 137; *Engel v. Traction Co.*, 203 N. Y. 324.

Q. A is injured by falling on the sidewalk in front of B's house. The sidewalk was out of repair and in a dangerous condition. A brings action against B to recover damages for the injuries sustained. B answers denying any liability, claiming that he was under no duty to repair the sidewalk. At the trial, A introduces evidence to show that shortly after the accident B made certain repairs to the sidewalk by replacing the broken stone with a new one. This evidence is objected to. Should the objection be sustained?

A. No. The evidence should be admitted for the purpose of showing whose duty it was to make the repairs, and for this purpose only; it is not admissible for the purpose of proving negligence. "The evidence to the effect that the defendant replaced the worn-out stone was admissible to show that the defendant had control over the sidewalk." *Bateman v. R. R.*, 47 Hun, 429; *Morrell v. Peck*, 88 N. Y. 399; *Sprague v. City of Rochester*, 52 App. Div. 53.

Q. A question arises in condemnation proceedings as to the value of a certain piece of property owned by A. A offers to

prove what had been paid for a similar piece of property situated in the same neighborhood. This is objected to. What should be the ruling of the court?

A. The objection should be sustained. "The reasons assigned for the conclusions reached in the cases cited are in the main: That the test in legal proceedings is, what is the present market value of the property which is the subject of the controversy? It may be shown by the testimony of competent witnesses, and on cross-examination, for the purpose of testing their knowledge respecting the market value of land in that vicinity, they may be asked to name such sales of property and the prices paid therefor, as have come to their attention. But a party may not establish the value of his land by showing what was paid for another parcel similarly situated, because it operates to give to the agreement of the grantor and grantee the effect of evidence by them that the consideration for the conveyance was the market value, without giving to the opposite party the benefit of cross-examination to show that one or both were mistaken. If some evidence of value, then prima facie a case may be made out so far as the question of damages is concerned by proof of a single sale, and thus the agreement of the parties, which may have been the result of necessity or caprice, would be evidence of market value of land similarly situated, and become a standard by which to measure the value of land in controversy. This would lead to an attempt by the opposing party to show, first, the dissimilarity of the two parcels of land; and, second, the circumstances surrounding the parties which induced the conveyance. Thus each transaction in real estate, claimed to be similarly situated, might present two side issues which could be made the subject of as vigorous contention as the main issue, and if the transactions were numerous it would result in unduly prolonging the trial, and unnecessarily confusing the issues, with the added disadvantage of rendering preparation for trial difficult. Value of property having a recognized market value, such as number one wheat and corn, may of course be proven by showing the market prices, but the value of property which is dependent upon

locality, adaptability for a particular use, as well as the use made of the property immediately adjoining, may not be shown by evidence of the price paid for similar property." Parker, J., in *Petition of Hubert Thompson*, 127 N. Y. 463. This case has been followed in *Manhattan R. R. v. Stuyvesant*, 126 App. Div. 848; *Matter of City of N. Y. (Crotona Park)*, 142 App. Div. 667; *Matter of N. Y., Westchester & Boston R. R. Co.*, 151 App. Div. 54.

Q. A brings action against a municipality to recover damages for personal injuries, caused by A tripping and falling over an obstacle in the walk. Is the testimony of others that they, at or about the same time, tripped over the same obstacle, competent?

A. The evidence is admissible. Evidence to show the happening of a similar accident at the same place is admissible to show that the street was unsafe, and also to show knowledge on the part of the city. The frequency of accidents at a particular place would seem to be good evidence of its dangerous character, at least it is some evidence to that effect. Besides this, as publicity was necessarily given to the accidents, they also tended to show that the dangerous character of the locality was brought to the attention of the city authorities. *Quinlan v. City of Utica*, 11 Hun, 217, aff'd in 74 N. Y. 603; *Magee v. City of Troy*, 48 Hun, 383, aff'd in 119 N. Y. 640; *Pomfrey v. Village of Saratoga*, 104 N. Y. 459; *Gillrie v. City of Lockport*, 112 N. Y. 403; *Fordham v. Gouverneur*, 160 N. Y. 541.

Q. A railroad company is sued by a passenger who received an injury. The complaint sets forth that the injury was caused by the neglect of the company to place in operation upon its road an improved switch, which was in use upon a few roads. Defendant offers evidence to show that the switch used by it was in general use on other roads. Is the evidence admissible?

A. Yes. Such evidence tends to show that the switch is such as a reasonably prudent person, exercising reasonable

diligence, would properly consider safe for the purposes for which it was designed. *Frace v. R. R.*, 143 N. Y. 182; *McGrell v. Buffalo Co.*, 153 N. Y. 265.

Q. A's house catches fire and is consumed. A sues the X Railroad Company, claiming that the fire was caused by sparks which escaped from one of the engines of the company. A shows by evidence that the fire could not have originated from any other cause, and then attempts to prove that passing locomotives of the X Company have, on other occasions, caused fires in the neighborhood by scattering sparks, and also that they have repeatedly scattered sparks, though no actual fire was thereby caused. The counsel for the road objects to the admission of this evidence. What should be the ruling of the court?

A. The evidence is admissible as tending to prove the possibility that some locomotive caused the fire, and as tending to show a negligent habit of the officers and agents of the railroad company. "The business of running the trains on a railroad supposes a unity of management and a general similarity in the fashions of the engines and the character of the operations. I think, therefore, it is competent *prima facie* evidence for a person seeking to establish the responsibility of the company for a burning upon the track of the road, after refuting every other probable cause of fire, to show that about the time it happened, the trains which the company was running past the location of the fire were so managed in respect to the furnaces, as to be likely to set on fire objects not more remote than the property burned." *Denio, Ch. J., in Sheldon v. R. R.*, 14 N. Y. 218. See also *Field v. R. R.*, 32 N. Y. 339; *Crist v. R. R.*, 58 N. Y. 638; *Peck v. R. R.*, 165 N. Y. 347; *Jacob v. R. R.*, 107 App. Div. 134; *People v. N. Y. C. R. R.*, 155 App. Div. 669.

Q. A brings an action against B for breach of promise of marriage. At the trial A offers evidence of the general reputation of B being a wealthy man. This is objected to. How should the court rule?

A. The evidence should be admitted upon the question of damages. It is competent to introduce evidence of the general reputation of the defendant's wealth in an action for breach of promise of marriage, so as to give the jury some ground for assessing the damages. *Chellis v. Chapman*, 125 N. Y. 214.

Q. B is on trial for receiving stolen property. He offers evidence to show that when A brought the property to him, A told him where and from whom he bought it, when he bought it, and the price he had paid for it. Is the evidence admissible?

A. The evidence is admissible, as showing how the defendant came by the property, and is competent upon the issue of guilty knowledge. As it was material to prove that he received the goods with knowledge that they were stolen, evidence to show that he received them under circumstances which would negative this knowledge was relevant. *People v. Dowling*, 84 N. Y. 478.

Q. A is on trial for obtaining goods under false pretenses and with fraudulent intent. He is asked by his attorney, "What was your intent?" The district attorney objects to the admissibility of this evidence. Should the objection be sustained?

A. No. "A party when charged with an intent to deceive, or cheat or defraud, has a right to testify as a witness in his own behalf, that he did not intend to cheat, deceive or defraud in the transaction wherein he is charged with having had such motive, leaving the weight due to his evidence to be determined by the jury." *Pope v. Hart*, 35 Barb. 630; *Seymour v. Wilson*, 4 Kern. 567; *Dillon v. Anderson*, 43 N. Y. 236; *Baylis v. Cockroft*, 81 N. Y. 371; *Lally v. Emery*, 54 Hun, 517.

Q. A brings an action against B to recover damages for fraud in the purchase of certain shares of stock, the complaint stating that he (A) had been induced to purchase the stock because of false and fraudulent representations in relation thereto, made to him by B and on which he relied to his damage. On the

trial A's attorney offered evidence of other similar representations made about the same time under similar circumstances to other purchasers of the stock by B. This is objected to. Is the objection good? Give reasons.

A. The objection should be overruled and the evidence admitted. It was competent upon the question of intent to defraud. *Cary v. Houghtaling*, 1 Hill, 311; *Miller v. Barber*, 66 N. Y. 559; *Hall v. Naylor*, 18 N. Y. 588. "In all cases where it is alleged that a party has acquired the property of another through some fraudulent device, the charge may be supported by proof of contemporaneous acts of the same character." *Boyd v. Boyd*, 164 N. Y. 241.

Q. A is on trial for receiving stolen goods from B with the knowledge that they were stolen. Evidence is offered to prove the receipt of similar goods at about the same time from B, which goods were stolen from a different firm. A's attorney objects. What should be the ruling of the court?

A. The objection must be overruled. "Upon the trial of a defendant indicted for the crime of feloniously receiving stolen property, which the defendant knew to have been stolen, evidence that the defendant had received property stolen by the same thieves from a different owner is admissible to establish the guilty knowledge of the defendant in receiving the property charged in the indictment to have been stolen." *People v. Doty*, 175 N. Y. 164. In this case *Werner, J.*, writing for the court, in an able opinion after reviewing all the authorities including *Coleman v. People*, 55 N. Y. 81; *Copperman v. People*, 56 N. Y. 591; *People v. Grossman*, 168 N. Y. 47, which formerly limited or seemed to limit this class of evidence to goods stolen from the same owner by the same thief, says: "Our conclusion, therefore, is that neither authority nor principle require us to hold that in prosecutions for receiving stolen property, evidence of other receivings by the same defendant from the same thief, can be admitted upon the question of a defendant's guilty knowledge only in cases where the different

thefts have been made from the same owner; but on the contrary we think there are cases, of which the one at bar is a fair example, in which the guilty knowledge of a defendant in the receiving of property charged in the indictment to have been stolen, may be established by evidence of other receivings from the same thief although in each case the property may have been taken from a different owner."

(NOTE.) "Where knowledge is a necessary ingredient of a crime, evidence of similar acts by the defendant at or about the same time is admissible. Such evidence has been sanctioned in cases involving the uttering of forged instruments, counterfeiting, obtaining money by false pretenses, receiving stolen property, etc." *People v. Marrin*, 205 N. Y. 275.

Q. A is indicted for burglary. Upon the trial the district attorney offers evidence to prove the general bad character of A. An exception is taken to the ruling admitting the testimony. Is the exception well taken?

A. The exception is well taken, as the prisoner here does not appear to have offered evidence of his own good character before the attempt of the prosecution to introduce evidence of his bad character. The character of a prisoner cannot be attacked, unless he has himself put his character in issue by introducing evidence of his good character. It is only after the defendant has opened the door as to his character, that the prosecuting attorney will be permitted to give evidence of the bad character of the accused. *People v. White*, 14 Wend. 111; *People v. Sharp*, 107 N. Y. 457; *People v. Pekarz*, 185 N. Y. 470; *People v. Hinksman*, 192 N. Y. 421.

Q. Four witnesses testified upon the former trial of the same action. Of these witnesses one is dead, one insane, one has forgotten the facts, and the other who is a non-resident has departed from the state. How would you proceed to get the testimony of these witnesses before the court, if such testimony is admissible?

A. The evidence of the one that is dead, the evidence of the one that is insane, and the evidence of the one who is a non-

resident and has departed from the state, can be read at the new trial from the stenographer's minutes, but the evidence of the one that has forgotten the facts cannot be read in evidence. The only way to try to get this evidence before the court is to try to refresh his memory by calling his attention to the testimony that he gave on the former trial. Section 830 of the Code of Civ. Pro. provides for the reception of the evidence of the one that is dead, the one that is insane and for the non-resident.

Q. In an action by A against B, B defaults, but A appears. An inquest is taken, A being sworn and giving testimony in his own behalf. B subsequently makes a motion to have the default opened, which is granted; but before the retrial of the cause A dies. His personal representatives continue the action, and seek to have A's testimony given at the inquest read from the minutes. B's attorney objects. What should be the ruling of the court?

A. The objection should be overruled. The evidence was competent under sec. 830 of the Code of Civ. Pro., and as the defendant had the power to appear and cross-examine, his failure to do so was a waiver of that right. *Bradley v. Mirick*, 91 N. Y. 293; *Shaw v. R. R.*, 187 N. Y. 186.

Q. A man was killed in a railroad accident. On the trial of an action by his personal representatives for damages, the plaintiff offered to prove dying declarations of the deceased as to the manner of his injuries. These declarations were made about two days after the accident. The attorney for the railroad company objects to the admission of this evidence. What should be the ruling of the court?

A. The objection should be sustained. The declarations having been made after the accident are not part of the *res gestæ*, and therefore inadmissible. "Even dying declarations are not received in civil actions unless part of the *res gestæ*. Such declarations made in the immediate presence of death, under the most solemn circumstances, when all motive to

pervert the truth may be supposed to have ceased to operate, are received only in trials for homicide of the declarant in cases where the death of the deceased is the subject of the charge, and the circumstances of the death are the subject of the dying declarations. It is said that the reason for thus restricting the rule may be, that credit is not in all cases due to the declarations of a dying person, for his body may survive the power of his mind; or his recollection, if his senses are not impaired, may not be perfect; or for the sake of ease, and to be rid of the importunity and annoyance of those around him, he may say, or seem to say, whatever they may choose to suggest. The rule admitting dying declarations as thus restricted stands only upon the ground of the public necessity of preserving the lives of the community by bringing manslaughterers to justice." Earl, J., in *Waldele v. R. R.*, 95 N. Y. 274.

Q. When as a general rule are dying declarations admissible in evidence? Why are they admitted, and on what ground? What circumstances are essential to their admission?

A. Dying declarations are not admitted in civil cases, but only in criminal cases of homicide. It is well settled that dying declarations are admissible in cases of homicide only when the death of the decedent is the subject of the charge, and the circumstances of the death are the subject of the declarations and that they may not properly include narratives of past occurrences. *People v. Davis*, 56 N. Y. 95; *Eighmy v. People*, 79 N. Y. 546; *Greenfield v. People*, 85 N. Y. 75. See Chase's *Stephen's Law of Ev.*, 86, Art. 26. The declarant must be shown to the satisfaction of the court to have been in actual danger of death, and to have given up all hope of recovery at the time when the declaration is made. The sense of impending death is deemed equivalent to the sanction of an oath. The person offering the declarations in evidence must show that they were made under the sense of impending death. The declarations are admissible when made within a reasonable time after the commission of the crime. *Brotherton v. People*, 75 N. Y. 159; *People v. Smith*, 104 N. Y. 491. The rule re-

specting the admission of dying declarations, is, that in order to make them competent as evidence, it must appear that the person making them does so under a belief of impending death and when entertaining no hope of recovery. Before such declarations can be admitted in evidence both conditions of mind must be established. Belief in impending death alone is not sufficient. Abandonment of hope of recovery must also be shown. *People v. Chase*, 79 Hun, 296, aff'd in 143 N. Y. 669; *People v. Conklin*, 175 N. Y. 333; *People v. Brecht*, 120 App. Div. 771.

Q. A is found mortally wounded. B, who assists him to regain consciousness, asks him who inflicted the injuries upon him. A answers, "I think it was C." C is subsequently arrested and tried for A's murder. Upon his trial, the district attorney attempts to put in evidence the dying declarations of A. C's attorney objects. What should be the ruling of the court?

A. The objection should be sustained. The evidence is inadmissible. "Upon trials for murder, declarations of the deceased made when in extremis, which are not statements of fact which a living witness would have been permitted to testify to, but are merely expressions of belief and suspicions are not admissible." *People v. Shaw*, 63 N. Y. 36. "Statements made by decedent as to an occurrence which transpired several hours before the homicide and which was an independent transaction not shown to have had any connection with the crime, are not admissible as dying declarations." *People v. Smith*, 172 N. Y. 212.

(NOTE.) "Statements made by the deceased, as to the identity of his assailant, are properly admitted in evidence as dying declarations, where it appears that they were made in conjunction with numerous declarations of deceased to the effect that he was about to die and the proof presents a picture of a man actually dying whose utterances were spoken under a sense of impending death and without hope of recovery, since such evidence constitutes a sufficient foundation for the admission of his statement. While the prosecution must show that the deceased was in actual danger of death and had given up all hope of recovery at the time when his declarations were

made, that fact may be proved like any other, and can be inferred from the existing and surrounding circumstances." *People v. Del Vermo*, 192 N. Y. 470.

Q. A is on trial for the murder of B. C has already been convicted for the same murder. The attorney for A offers a statement by C made immediately before his (C's) execution to the effect, that so far as he (C) knew A had nothing to do with the murder of B. This statement of C is offered as a dying declaration, but is objected to by the district attorney. How should the court rule?

A. The objection should be sustained. "Although at common law dying declarations were admissible only on trials for murder or manslaughter, they have been made admissible by statute in New York in prosecutions for abortion. (Code Crim. Pro. sec. 348a.) So clearly established was the restriction to cases of homicide that a legislative enactment was deemed necessary to warrant the admission of dying declarations in any other class of cases. (*People v. Davis*, 56 N. Y. 95.) In the case cited it was held by this court that dying declarations were admissible in cases of homicide only, where the death of the deceased is the subject of the charge and the circumstances of the death are the subject of the dying declarations. . . . The declaration must be a statement by the victim of the crime, and however cogent may be the reasoning of admitting proof of declarations by any victim about to die and aware of his approaching dissolution, it suffices to say that up to the present time, evidence of dying declarations has never been admissible under the law of the state of New York unless the declaration proceeded from the victim of the assault, the alleged perpetrator of which was on trial." *People v. Becker*, 215 N. Y. 126.

Q. A witness testifies to an ante-mortem statement made by the deceased. The judge allows the same. Admitting the ruling to be correct, is the following charge to the jury sustainable on appeal? "This testimony should be given the greatest weight that the law can give to any evidence, for it is the best evidence."

A. The charge was clearly erroneous and cannot be sustained on appeal. "While dying declarations when admitted in evidence are entitled to be considered as having the weight of an oath, they are not of the same value and weight as the direct evidence of a witness subject to cross-examination, and whose demeanor, when upon the stand, is open to the observation of the jury. An instruction, therefore, that such declaration should be given all the sanction of evidence which the law can give to any evidence, is reversible error." *People v. Kraft*, 148 N. Y. 631; *People v. Carbone*, 156 N. Y. 413.

(NOTE.) "The statement, in charging the jury upon the subject of dying declarations, that 'it is the experience of mankind that the premonition of immediate death, from which there is no hope of recovery, is always sufficient to influence persons so situated to speak the truth' is erroneous, and when not so modified by other portions of the charge as to correct its tendency to injure the defendant, is ground for reversal of a judgment of death." *People v. Corey*, 157 N. Y. 332. In that case Vann, J., said: "Dying declarations are received from necessity, in order to prevent a failure of justice, upon the theory that the belief of impending death is equivalent to an oath. The rule as we understand it goes no further. The fear of punishment by the law for perjury furnishes no safeguard that the declarant will speak the truth, and hence such evidence has no sanction except a belief in responsibility after death. All men, however, do not entertain that belief." See also *People v. Gouvernale*, 193 N. Y. 581.

Q. It was important for the plaintiff in an action of ejectment to establish the date of the marriage of A and B, both of whom were lost at sea thirty years before. Plaintiff claimed to be the legitimate son of A and B. He offered to show by C, that C had heard the mother of B say about ten years before, that her daughter was married to A on the date claimed by the plaintiff. The mother has since died. The evidence was objected to as incompetent and hearsay. How did the court rule, and on what theory?

A. The evidence was admissible as a pedigree statement, as the question involved in this case is purely a genealogical one, i. e., descent and relationship. "It seems to me that they are competent as hearsay evidence in a case of pedigree. Such a case is a well-known and recognized exception to the general

rule excluding hearsay evidence. This case (action of ejectment by one claiming to be a legitimate son) involves without a doubt a question of pedigree simply. It is what is termed in the books a purely genealogical controversy. . . . The exception regarding the admission of hearsay evidence in a case of pedigree is not confined to ancient facts, but extends also to matters of pedigree which have recently transpired; and the hearsay as to deceased witnesses is admitted as to facts which have occurred in the presence of living witnesses. Matters of pedigree consist of descent and relationship, evidence of declarations of particular facts, such as births, marriages, and deaths. . . . Upon questions of pedigree, i. e., in a controversy merely genealogical, hearsay evidence is allowed as to the time of the birth of a certain party, as to a marriage, death, legitimacy, or the reverse, consanguinity generally, and particular degrees thereof, and of affinity. The term 'pedigree' says Greenleaf, not only embraces descent and relationship, but also the fact of birth, marriage and death, and the time when these events happen, and the rule permits hearsay evidence of the declarations of deceased members of the family upon these points in any case involving pedigree. . . . As to what is a case of pedigree, an examination of the question shows a case is not necessarily one of that kind, because it may involve questions of birth, parentage, age, or relationship. Where these questions are merely incidental, and the judgment will simply establish a debt, or a person's liability on a contract, or his proper settlement as a pauper, and things of that nature, the case is not one of pedigree, although questions of marriage, death, or birth, are incidentally inquired." Peckham, J., in *Eisenlord v. Clum*, 126 N. Y. 552. "Pedigree is the history of family descent, which is transmitted from one generation to another by both oral and written declarations, and unless proved by hearsay evidence it cannot in most instances be proved at all. Hence, declarations of deceased members of a family made ante litem motam, are received to prove family relationship including marriages, births and deaths, and the facts necessarily resulting from these events. Before they can be received, however, as evidence of pedigree, it must appear

that the person making them was a member of the family and that he is dead, incompetent or beyond the jurisdiction of the court." *Young v. Shulenberg*, 165 N. Y. 385. See also *Washington v. Bank for Savings*, 171 N. Y. 166.

Q. Upon a certain trial for abduction, it becomes necessary and material to prove the age of the female abducted. For the purpose of proving the girl's age, the district attorney offers in evidence a family Bible containing entries of births. Counsel for the prisoner objects to this testimony. Is the evidence admissible?

A. Yes. Although this is not a question of pedigree, as there is no genealogical controversy, the evidence is nevertheless admissible under sec. 817 of the Penal Law, which in part is as follows: "Whenever in any legal proceedings it becomes necessary to determine the age of a child, the child may be produced for personal inspection, to enable the magistrate, court or jury, to determine the age thereby; and the court or magistrate may direct an examination by one or more physicians, whose opinion shall also be competent evidence upon the question of age. A copy of the record of baptism of any child in any parish register, or register kept in a church, or by a clergyman thereof, or a certificate of baptism duly authenticated by the person in charge of such register, or who administered said baptism, and also a transcript of the record of birth recorded in any bureau of vital statistics or board of health, duly authenticated by its secretary or under its seal, and *the entries made in a family Bible shall also be competent evidence upon the question of the age.*"

Q. A, a butcher, sues B for the value of certain meat furnished by him to B and his family. It was proved by several witnesses that A had been in the daily practice of supplying B's family with meat during the period for which he claimed payment. It was proved by some of those that dealt with him that he kept honest accounts. He then offered his books of account in evidence, it appearing that he employed no clerk.

The admission of the books in evidence was objected to, but the objection was overruled. An exception was taken, and the case now comes up on appeal. What should be the decision of the appellate court?

A. The evidence was properly admitted. "They are not evidence in the case of a single charge, because there exists, in such case, no regular dealings between the parties. They ought not to be admitted where there are several charges, unless a foundation is first laid for their admission, by proving that the party had no clerk, that some of the articles charged have been delivered, that the books produced are the account books of the party, and that he keeps fair and honest accounts, and this by those who have dealt and settled with him." *Vosburg v. Thayer*, 12 Johns. 461. This case represents the so-called shop book rule of this state. *McGoldrick v. Traphagen*, 88 N. Y. 334; *West v. Van Tuyl*, 119 N. Y. 620; *Smith v. Smith*, 163 N. Y. 168; *Swan v. Werner*, 197 N. Y. 191. A clerk means some one who had something to do with, and had knowledge generally of the business of his employer and who would be enabled to testify upon the subject of the goods sold. The plaintiff's wife cannot be claimed to be a clerk, within the meaning of the rule. *Smith v. Smith* (supra); *Levison v. Katz*, 75 Misc. 466.

(NOTE.) "The rule which prevails in this state, that the books of a tradesman or any other person engaged in business containing items of account, kept in the ordinary course of book account, are admissible in favor of the person keeping them against the party against whom the charges are made, after certain preliminary facts are shown, has no application to the case of books or entries relating to cash items or dealings between the parties. This qualification of the rule was recognized in the earliest decisions of this state, and has been maintained by the courts with general uniformity. It stands upon clear reasons. The rule admitting account books of a party in his own favor in any case, was a departure from the ordinary rules of evidence. It was founded upon a supposed necessity, and was intended for cases of small traders who kept no clerks, and was confined to transactions in the ordinary course of buying and selling or the rendition of services. In these cases some protection against fraudulent entries afforded in the publicity which to a greater or less extent attends the manual transfer of tangible articles of property or the rendition of services, and the knowledge which third persons

may have in the transactions to which the entries relate. But the same necessity does not extend in relation to cash transactions. They are usually evidenced by notes or writings or vouchers in the hands of the party paying or advancing the money." *Andrews, J.*, in *Smith v. Rentz*, 131 N. Y. 169. See also *Simons v. Steele*, 82 App. Div. 205; *Brown v. Bronson*, 93 App. Div. 315.

Q. A witness is called to prove a payment to plaintiff. He is unable to recall that he made such payment. On looking up an entry which he made, and which he testifies to be correct, he says his memory is refreshed, and he now remembers the payment to which he testifies positively. The entry is then offered in evidence. Is it admissible?

A. No. "It is indispensable to the admission in evidence of a memorandum made by a witness at the time of the making of an alleged agreement, that it be shown that the witness has no recollection of the matter stated therein independent of the written paper. If he has such recollection, the entry is not admissible." *Meacham v. Pell*, 51 Barb. 65. "The rule which renders such entries admissible rests upon the principle of necessity for the reception of secondary evidence, and is not applicable where the witness has a distinct recollection of the essential facts to which they relate. The primary common law proof is then furnished, and the necessity for evidence of the lesser degree does not arise, and so it is incompetent." *Nat. Bank v. Madden*, 114 N. Y. 280, 285. See also *People v. McLaughlin*, 150 N. Y. 392.

(NOTE.) "In an action for conversion of personal property consisting of many items, a witness who has made a list of all the items and their values, and who is able to testify that all the articles named were taken and were of the value stated, may aid his memory while testifying, by such lists, and may use it to enable him to state the items; after he has testified the list may be put in evidence, not as proving anything of itself, but as a detailed statement of the items testified to." *Howard v. McDonough*, 77 N. Y. 592.

Q. On the trial of an action a witness is called to prove a certain payment; he is unable to recall the fact that he made one. He is shown an entry which states the payment and the date thereof. He testifies that his memory is not refreshed, but that he had acknowledged the fact when he made the entry,

and that the entry records correctly what he then knew to be true. Is the entry admissible in evidence?

A. Yes. "In *Halsey v. Sinsebaugh*, 15 N. Y. 435, the question whether a memorandum, made at or about the time when the event or transaction mentioned in it took place, and where the author swears that he knows it to have been correct when made, can be read to the jury in connection with the oral testimony of the witness, or whether the evidence is confined to what the witness is able to recollect after refreshing his memory by referring to the memorandum, came up for decision in this court. And it was held to be admissible. The paper did not fall within the rule as an entry made in the course of business, like the memoranda and entries made by clerks in banks and the like; and it was not placed on that footing in the opinion of the court. On the contrary, Judge Selden, by whom the opinion was prepared, took pains to say that he did not consider the case of such memorandum as the one then in question, was governed by any particular rule, but that the general question was presented, whether a memorandum, that is, any memorandum made and sworn to in the manner stated, would be admissible. The whole of the reasoning of the opinion, and the cases relied upon, sustain the position as a general one applicable to every species of memorandum, and not restricted to the routine entries referred to." Denio, J., in *Guy v. Mead*, 22 N. Y. 482; *Clark v. Bank*, 164 N. Y. 498; *McCarthy v. Meaney*, 183 N. Y. 190; *Donler v. Pru. Ins. Co.*, 143 App. Div. 539.

Q. A is the foreman and B is the bookkeeper of the X Corporation. The X Corporation sues C for goods sold and delivered. At the trial, entries in the books of the corporation are offered in evidence, and by way of foundation A is called as a witness. He swears that he does not remember the transactions, but that he always reported correctly to B each day the bills of goods made and delivered. B is then called and swears that he does not remember the transactions, but that he always entered the reports of A correctly in the books. Are the entries admissible?

A. Yes. "Where a party testifies that he made certain entries in a book in accordance with statements made to him by others, and such others testify that the facts were correctly given to him and that he entered them, such evidence is admissible. An entry is not incompetent evidence because of its being of a fact not within the personal knowledge of the party making it. It is enough if it appears that such entry rests upon knowledge and not hearsay, and is proved to have been correctly made." *Payne v. Hodge*, 7 Hun, 171, *aff'd* in 71 N. Y. 598.

(NOTE.) "We are of opinion that the rule as to the admissibility of memoranda may properly be extended so as to embrace the case before us. The case is of an account kept in the ordinary course of business, of laborers employed in the prosecution of the work, based upon daily reports of foreman who had charge of the men, and who, in accordance with their duty, reported the time to another subordinate of the same common master, but of a higher grade, who in turn, also in accordance with his duty, entered the time as reported. We think entries so made, with the evidence of the foreman that they made true reports, and of the person who made the entries that he correctly entered them, are admissible. It is substantially by this method of accounts, that business transactions in numerous cases are authenticated, and business could not be carried on, and accounts kept in many cases, without great inconvenience, unless this method of keeping and proving accounts is sanctioned. In a business where many laborers are employed, the accounts must, in most cases of necessity, be kept by a person not personally cognizable of the facts,—and from reports made by others. . . . We are of opinion, however, that it is a proper qualification of the rule admitting such evidence, that the account must have been made in the ordinary course of business, and that it should not be extended so as to admit a mere private memorandum not made in pursuance of any duty owing by the person who made the communication casually and voluntarily, and not under the sanction of duty or other obligation." *Andrews, J., in Mayor, etc., v. Second Ave. R. R.*, 102 N. Y. 572. See also *Cornell v. Standard Oil Co.*, 91 App. Div. 351; *Collins v. Carlin*, 106 App. Div. 206.

Q. On the trial of an action of A against the X Company for conversion of certain machinery, declarations of C who is dead, are offered in evidence by A as against the X Company. C was a director of the X Company who had negotiated the purchase of the machinery, and the declarations were offered to prove that the X Company had knowledge of A's claim of

title to the machinery. Objection is made that the evidence is hearsay and incompetent. What should the ruling be and for what reason?

A. The declarations should be admitted as they were declarations against the interest of the party making them, therefore likely to be true, and the declarant was dead and had possessed competent knowledge of the facts. The rule is stated in Greenleaf on Evidence, sec. 147, as follows: "A third exception to the rule, rejecting hearsay evidence, is allowed in the case of declarations and entries made by persons since deceased, and against the interest of the persons making them, at the time they were made. . . . This class embraces not only entries in books, but all other declarations or statements of facts, whether verbal or in writing, and whether they were made at the time of the fact declared or at a subsequent day. But to render them admissible, it must appear that the declarant is deceased; or that it was his duty to know them; and that the declarations were at variance with his interests." "The court receives declarations of a deceased person against his interest because of their likelihood of being true, of their general freedom from any reasonable probability of fraud, and because they cannot be set up or proven until the death of the party making them." Peckham, J., in *Lyon v. Ricker*, 141 N. Y. 225. See also *Griffin v. Train*, 90 App. Div. 16; *Tompkins v. Fonda Glove Co.*, 188 N. Y. 261.

Q. A, a passenger, was killed by the derailing of the locomotive, caused by a defective rail. A physician who attended the decedent about an hour after the accident, testified that the decedent who had been insensible, upon regaining consciousness exclaimed: "My head! My head!" Being interrogated further, the physician testified as to certain things told him by A at the time, which would prevent the plaintiff from succeeding in the action. Plaintiff objects. Is the objection good? How far good, if good at all?

A. The exclamations having been made an hour after the accident are clearly inadmissible as a part of the *res gestæ*,

but are admissible as declarations as to the state of health or bodily feeling. "In actions to recover damages for alleged negligence causing a personal injury, declarations of the party injured made some time after the injury, simply to the effect that he is suffering pain, when not made to a physician for the purpose of professional attendance, are not competent. The rule is different as to groans, screams, or exclamations indicative of pain." *Roche v. R. R.*, 105 N. Y. 294; *Davidson v. Cornell*, 132 N. Y. 237. As to the subsequent statements made by A, they are also admissible, and the physician is not precluded from testifying, the statements not being privileged communications. "The prohibition of sec. 834 of the Code of Civ. Pro., relating to communications between physicians and patients, extends only to such communications as are necessary to enable the physician to act in his professional capacity, and does not extend to admissions made by the patient of facts which have no possible relation to the professional conduct of the physician." *DeJong v. R. R.*, 43 App. Div. 427; *Griebel v. R. R.*, 68 App. Div. 205; *Deutschman v. R. R.*, 87 App. Div. 515.

Q. At the probate of a lost or destroyed will, a witness swears that he was present when the decedent took the paper, declared it to be his will, stated its contents, and that because his son had acted in a certain way he would destroy it. He thereupon took the paper and threw it into the fire, while the witness was looking on. His testimony is objected to. Shall the objection be sustained?

A. No. The evidence is admissible, as the declarations accompanied the act, and were a part of the *res gestæ*. "I consider these cases as establishing the doctrine that upon a question of revocation no declarations of the testator are admissible except such as accompany the act by which the will is revoked; such declarations being received as part of the *res gestæ*, and for the purpose of showing the intent of the act. . . . The fact to be proven in such cases is, the act claimed to be a revocation together with the intent with which it was done;

and all declarations of the testator which do not accompany the act are to be regarded as mere hearsay, and should be treated as such." Selden, J., in *Waterman v. Whitney*, 11 N. Y. 158; *Re Kathan's Will*, 141 N. Y. Suppl. 715.

Q. The probate of the will of A is contested by his son B on the ground of the insanity of A. Evidence is offered at the trial of the declarations of A made two months after the execution of the will, and stating the contents of the will to be different than its original contents. The evidence is objected to. What should be the ruling of the court? If admissible at all, how and for what purpose?

A. The evidence is admissible for the purpose of showing the mental condition of the testator at the time of the execution of the will. "Here, as in that case, the offer was to prove declarations of the testator stating the contents of the will to be entirely different from what they were in fact; and these declarations were offered in connection with other evidence bearing upon the competency of the testator at and before the execution of the will. If evidence of the mental condition of the testator after the execution of the will is admissible in any case, as to his capacity when the will was executed, and the competency of such proof seems to be sustained by many authorities and contradicted by none, then it is clear that the testimony offered here should have been admitted. It does not follow from this, that evidence of this nature is necessarily to be received however remote it may be in point of time from the execution of the will. The object of the evidence is to show the mental state of the testator at the time when the will was executed." Selden, J., in *Waterman v. Whitney*, *supra*, a leading case followed in *Marx v. McGlynn*, 88 N. Y. 374; *Matter of Woodward*, 167 N. Y. 28; *Chambers v. Chambers*, 61 App. Div. 308; *Smith v. Keller*, 205 N. Y. 49. It should be observed that while the declarations of the testator are admissible on the question of his mental condition at the time of the execution of the will, they are not competent evidence of the facts stated. They are allowed for the purpose of showing

the mental strength of the testator's mind, but when so admitted as evidence, they should be confined to that purpose only.

Q. A was duly authorized by B, as his agent, to purchase of C a quantity of furniture for him, B. A purchased the same, and it was duly delivered to B, who became insolvent before it was paid for. C replevied the goods, claiming title. B defended, denying plaintiff's title. On the trial, C testified that the goods were sold on sixty days' credit, and that it was verbally agreed between himself and A at the time of the sale, that title should remain in him, C, until the furniture was paid for. C was then allowed to prove, over the defendant's objection, as a part of his case, that about a month after the sale and delivery, A stated to X that he had agreed with C, at the time of the purchase, that title should remain in him until the furniture was paid for. Was the evidence competent or otherwise? State your reasons and the rule.

A. The evidence was incompetent and should have been excluded. "Evidence of declarations of an agent made to a third party as to the nature of a past transaction is inadmissible against his principal. The fullest authority to an agent to contract confers no power to bind the principal by subsequent declarations as to what the contract was. The declaration in order to be admissible must be a part of the *res gestæ*." *Wood v. Pierson*, 46 State Rep. 70; *Ins. Co. v. R. R.*, 139 N. Y. 146; *Arnold v. Rockland Co.*, 123 App. Div. 661.

Q. A tells his servant to sell his wagon. The servant represents the wagon to be a "Brewster" make. The servant said to a witness: "John Doe (buyer) thinks he has bought a Brewster wagon, but he has not," referring to the wagon sold. This conversation took place about an hour after the sale. The buyer sues A and wants to introduce this testimony of the witness as to the servant's declarations to show that the article sold was not what it was represented. Is this admissible?

A. No. The evidence was not admissible, as it consisted of declarations of an agent made when not engaged in the business of his agency, and so not binding upon his principal. The declarations of an agent, in order to bind his principal, must be made not only during the continuance of the agency, but at the very time of the transaction in question, and so forming part of the *res gestæ*. *Anderson v. R. R.*, 54 N. Y. 334; *White v. Miller*, 71 N. Y. 118; *Taylor v. Commercial Bank*, 174 N. Y. 191.

Q. A is run over by a street car and killed. His representatives bring an action on the ground of negligence of the motorman, and also claim that the brakes were out of repair. On the trial they were allowed to prove by the testimony of a bystander, that just as the car stopped and while A was under it, the motorman in response to a question said he could not reverse the brake, and that was why he could not stop. Was the evidence admissible, and if so, why?

A. This evidence is not admissible as part of the *res gestæ*, as the declaration was made after the car stopped. "The declaration of the driver after the accident had occurred and the car had been stopped, but before he had left it, that he could not stop the car because the brakes were out of order, is mere hearsay, and not admissible in evidence against his employer. The declaration was no part of the driver's act for which the defendants were sued. It was not made at the time of the act, so as to give it quality and character. The alleged wrong was complete, and the driver, when he made the statement, was only endeavoring to account for what he had done. He was manifestly excusing himself and throwing the blame on his principal." *Luby v. R. R.*, 17 N. Y. 131. See also *Whitaker v. R. R.*, 51 N. Y. 295, where a declaration made immediately after the car had passed the scene of the accident was held inadmissible. The phrase *res gestæ* in cases of this character implies substantial coincidence in time. The declaration must be contemporaneous with the act. *Sherman v. R. R.*, 106 N. Y. 542; *Taylor v. R. R.*, 63 App. Div. 590; *Barnes v. Borden's Milk Co.*, 93 App. Div. 566.

Q. A brings action to recover damages for alleged negligence causing the death of B, his son. At the trial, the plaintiff offers in evidence certain statements made by B thirty minutes after the accident. Objected to. Is the evidence admissible? State the rule.

A. The evidence is not admissible, as the declarations were not part of the *res gestæ*, having been made after the accident. "The claim that the declaration can be treated as part of the *res gestæ* is not supported by authority in this state. The *res gestæ*, speaking generally, was the accident. These declarations were no part of that, . . . were not made at the same time, or so nearly contemporaneous with it as to characterize it, or throw any light upon it. They are purely narrative, giving an account of a transaction not partly past but wholly past and completed. They depend for their truth wholly upon the accuracy and reliability of the deceased, and the veracity of the witness who testifies to them. Nothing was then transpiring or evident to any witness which could confirm the declarations, or by which upon cross-examination of the witness testifying, or by the examination of other witnesses the truth of the declarations could be tested." Earl, J., in *Waldele v. R. R.*, 95 N. Y. 274.

(NOTE.) "It is very difficult to enunciate any principle from the authorities on this subject which will fit every case. In order to make a declaration of this kind competent it seems to be settled that it must bear a close relation to the principal transaction and that it must be a spontaneous exclamation, an outburst of the feelings, and not a mere narration of a past event." *Scheir v. Quirin*, 77 App. Div. 629. The Court of Appeals in *People v. Del Vermo*, 192 N. Y. 470, at p. 483, stated the rule to be as follows: "Evidence is admissible of exclamatory statements declaratory of the circumstances of an injury when uttered by the injured person immediately after the injury; provided that such exclamations be spontaneously expressive of the injured person's observation of the effects of a startling occurrence, and the utterance is made within such limit of time as presumably to exclude fabrication. It will be observed that this exception contemplates and permits proof of declarations by an injured person made after the event, so that it cannot fairly be said that the words spoken really constituted a part of the thing done." This case was followed in the recent case of *Greener v. Gen. Electric Co.*, 153 App. Div. 439.

Q. A sues the N. Y. C. R. R. Co. for injuries sustained by the closing of the gate upon him by the brakeman on the train. At the trial, he offers in evidence the reply of the brakeman to the exclamation of pain made by him (A) when he was hurt. This is objected to. Is the objection good?

A. The objection should be sustained, as the remarks of the brakeman were not a part of the *res gestæ*. The exclamation must be part of the principal fact, and so part of the act itself. But here the act was complete before the remark of the brakeman was made; although closely connected with it in point of time, it was not one naturally accompanying the act or calculated to unfold its character or quality, and therefore not admissible as part of the *res gestæ*. If declarations of third persons are not in their nature a part of the fact, they are not admissible in evidence, however closely related in point of time. *Butler v. R. R.*, 143 N. Y. 417.

Q. A was on trial for murder. The district attorney asks an expert the following question: "Having heard all the testimony adduced in this case, what is your opinion as to the sanity of the defendant when he committed the crime?" The defense of insanity had been interposed. The question was objected to. Is the objection sustainable?

A. The objection is good; the question was improper. "The witness was thus permitted to take into consideration all the evidence in the case given upon a long trial extending over nine days, and upon so much of it as he could recollect, determine for himself the credibility of the witnesses, the probability or improbability of their statements, and drawing therefrom such inferences as in his judgment were warranted by it, pronounce upon the sanity or insanity of the defendant. We think it is not competent in any case to predicate a hypothetical question to an expert upon all the evidence in the case, whether he has heard it all or not, upon the assumption that he then recollects it, for it would then be impossible for the jury to determine the facts upon which the witness bases his opinion, and whether

such facts were proved or not." Ruger, Ch. J., in *People v. McElvaine*, 121 N. Y. 250; *McGuire v. R. R.*, 30 App. Div. 228; *Becken v. Ins. Co.*, 99 App. Div. 10.

(NOTE.) "It is not sufficient to warrant the introduction of expert evidence that the witness may know more of the subject of the inquiry and may better comprehend and appreciate it than the jury; but the subject must be one relating to some trade, profession, science or art, in which persons instructed by study or experience, may be supposed to have more skill and knowledge than jurors of average intelligence may be presumed to have." "The general rule of law is that witnesses must state facts within their knowledge, and not give their opinions or their inferences. Where the facts can be placed before a jury, and they are of such a nature that jurors generally are just as competent to form opinions in reference to them and draw inferences from them as witnesses, then there is not occasion to resort to expert or opinion evidence." Earl, J., in *Ferguson v. Hubbell*, 97 N. Y. 507, a leading case cited with approval in *Dougherty v. Milliken*, 163 N. Y. 527; *Curtis v. R. R.*, 147 App. Div. 352; *Welle v. Celluloid Co.*, 186 N. Y. 319; *Pearce v. Stace*, 207 N. Y. 511.

Q. A brings an action against B to recover damages for the death of C, alleged to have been caused by the negligence and carelessness of B in running his automobile and knocking C down, causing his death. On the trial, D, who was in court and heard all the testimony on both sides, was asked by A's attorney, after qualifying as an expert, the following question: "Having heard all the testimony in this case, what in your opinion is the cause of C's death?" This was objected to. What should be the ruling of the court?

A. The question should be excluded; the proper way is to ask the expert a hypothetical question containing facts which are assumed to have been proven. "In such a case, it is not the province of the witness to reconcile and draw inferences from the evidence of other witnesses, and to take in such facts as he thinks their evidence has established, or as he can recollect and carry in his mind and thus form and express an opinion. His opinion may be obtained by stating to him a hypothetical case, taking in some or all facts stated by witnesses, and claimed by counsel putting the question to be established by their evidence, and when the question is thus stated the

witness has in his mind a definite state of facts, and the province of the triers, whether referees or jurors, is not interfered with." *Reynolds v. Robinson*, 64 N. Y. 589; *Guiterman v. S. S. Co.*, 83 N. Y. 358; *Gregory v. R. R.*, 28 State Rep. 726; *People v. Barber*, 115 N. Y. 475.

Q. A sues B. On the trial, A's attorney asks C, a witness of B's, as to the whereabouts of a letter written to B by A. C answers that he does not know where it is. A's attorney thereupon attempts to introduce parol evidence of the letter. B's attorney objects. Is the objection good? State the rule.

A. The objection is good. The rule is, that where a writing is in the possession of the adverse party, he must be notified to produce it at the trial, and it is only upon his failure or refusal to do so, that parol evidence of its contents is admissible. While the notice to produce is generally written, yet a verbal notice given in court is sufficient where the paper is in court at the time. In the question put, the paper having been in the possession of the adverse party, and not being proved to be in court, a notice to produce was necessary before secondary evidence could be given. *Kerr v. McGuire*, 28 N. Y. 446; *Foster v. Newbrough*, 58 N. Y. 481; *Dole v. Belden*, 1 N. Y. Suppl. 667; *Might v. Hicks*, 61 App. Div. 489.

Q. Upon the trial of an action, the plaintiff's attorney produces a paper upon notice from his opponent. The latter inspects the same, but refuses to put it in evidence. Can he be compelled to do so or not?

A. No. A party is not bound to read a paper in evidence, simply because it was produced by the opposite party on the trial at his request and was inspected by him. *Carradine v. Hotchkiss*, 120 N. Y. 608; *Smith v. Rentz*, 131 N. Y. 169; *Reed v. Zimmerman*, 48 State Rep. 637.

Q. A sues B, and on the trial B's attorney offers in evidence pages one and two of a four-page letter written by A to B.

A's attorney objects. What should be the ruling of the court? What rights has A?

A. The objection should be overruled, but A has the right to offer the rest of the letter in evidence. "The introduction by one party of a part of a conversation or writing in evidence, renders admissible on the other side so much of the remainder as tends to explain or qualify what has been received, and that is to be deemed a qualification which rebuts and destroys the inference to be drawn from, or the use to be made of, the portion put in evidence." *Grattan v. Ins. Co.*, 92 N. Y. 274; *Taft v. Little*, 178 N. Y. 127; *Sexton v. Onward Co.*, 93 App. Div. 143.

Q. A goes to the X Bank and makes an agreement with the president to make a special deposit for one year of \$1,000, and in a conversation with the president, it is agreed that he shall receive 6% interest for that term. He deposits the money and a certificate is given him in the following form:

\$1,000

Oct. 1st, 1915.

Deposited this day with the X Bank by A, One Thousand Dollars, payable one year from this date on presentation of this certificate.

(Signed) B, Cashier.

At the end of the year A presents the certificate and demands his \$1,000 with interest. The bank refuses to pay the interest, but tenders the \$1,000. A sues for \$1,000 with interest. Upon the trial he offers to prove the conversation with the president. Objection is made. What should be the ruling of the court? No question is raised as to the power of the president to make the arrangement for interest.

A. The objection must be sustained, as the evidence of an oral agreement made by the president at the time of the deposit to pay interest was incompetent, because its purpose was to vary the terms of the certificate of deposit. The general rule (so-called parol evidence rule) is that oral evidence

is not admissible to vary or contradict the terms of a written instrument. "Had the plaintiff, after receiving the certificate, made a demand for payment, and the defendants in order to secure the use of the money for a longer period, had promised to pay interest thereon, the plaintiff consenting, it is not questioned but such agreement could have been proven and enforced. But we do not understand the record before us to present such a situation. On the contrary, the writing and the alleged oral agreement appear to have constituted one transaction. What was said then respecting the paying of interest occurred at the time of delivering the certificate. And the terms of commercial paper cannot be varied by oral agreements forming part of the same transaction." *Read v. Bank of Attica*, 124 N. Y. 671. "The general rule, that evidence of what was said between the parties to a valid instrument in writing, either prior to or at the time of its execution, cannot be received to contradict or vary its terms, applies to promissory notes and bills of exchange." *Jamestown Coll. Assn. v. Allen*, 172 N. Y. 291; *Vacheron v. Hildebrant*, 39 Misc. 62; *Orange County Trust Co. v. Miller*, 149 App. Div. 292.

Q. In an instrument partly written and partly printed, there is a repugnancy between the written and printed parts. Which will prevail?

A. The written parts will prevail. In the interpretation of an instrument of which a portion is printed and a portion written, greater weight will be given to the written than to the printed words, when they are in conflict and tend to different results, as the written words are supposed to more safely and more nearly indicate the intention of the parties. *Clark v. Woodruff*, 83 N. Y. 513; *Kratzenstein v. Western Assn. Co.*, 116 N. Y. 54; *Collins v. Knuth*, 51 App. Div. 188.

Q. A makes a contract with B to build him a house with the agreement that the contractor is not to sublet any of the work. B sublets a portion of the work, and afterwards sues A

on the contract. A, on the trial, puts in evidence the agreement to show that B had no right to sublet. B claims that there was a parol agreement before the instrument was signed that a portion might be sublet, and offers evidence of the same. Is it admissible? State the rule.

A. The evidence is not admissible, as to allow it would be to vary and contradict the terms of the written instrument. The general rule requires the rejection of parol evidence when offered to cut down or take away obligations entered into between parties and by them put into writing. *Mott v. Richtmeyer*, 57 N. Y. 49; *Eighmie v. Taylor*, 98 N. Y. 288; *Engelhorn v. Rettlinger*, 122 N. Y. 176; *Mead v. Dunlevie*, 174 N. Y. 108.

Q. A gives B a lease and subsequently a dispute arises between the parties in regard thereto. A claims that there was an oral agreement under which the lease was delivered, and on the trial of an action between the parties, offers evidence to prove the same. Is the evidence admissible?

A. Yes. This is not an attempt to vary the terms of a lease, and therefore does not violate the parol evidence rule; it merely proves a collateral separate agreement under which it was delivered, and is not inconsistent with the terms of the lease. *Van Brunt v. Day*, 81 N. Y. 251; *Reynolds v. Robinson*, 110 N. Y. 654; *Blewitt v. Boorum*, 142 N. Y. 357; *Davies v. Hotchkiss*, 112 N. Y. Suppl. 233.

Q. A brings an action on a deed which recites a consideration of \$10,000. At the trial he offers to prove that the consideration was not in fact \$10,000, but \$5,000 and the good will of a certain business, and that the sum was not paid. The attorney for the other side objects to the evidence. Is it admissible?

A. Yes. "An acknowledgment of payment in the consideration clause of a deed does not conclude the grantor. In an action to recover the purchase price, he may show the actual

consideration, that it was not paid, and the time when and the manner in which it was to be paid." *Hebbard v. Haughian*, 70 N. Y. 54. Parol evidence is admissible to show the real consideration of a deed even though it be entirely different from the consideration expressed in the deed. This exception to the parol evidence rule is well recognized. *Ham v. Van Orden*, 84 N. Y. 269; *House v. Walch*, 144 N. Y. 418; *Baird v. Baird*, 145 N. Y. 651.

Q. A agrees by valid contract in writing to sell B thirty days from date, a certain pump called a pulsometer pump for \$800, payment to be made on delivery, the pump to be used to pump water from a mine. The pump was delivered and paid for. B tried the pump, but it did not work satisfactorily, and he then brings suit against A for breach of an oral warranty that the pump would throw water to the surface from the bottom of a shaft fifty-five feet deep. On the trial, B offered evidence of the oral warranty made by A at the time the contract was made. A's counsel objects to the proof of the warranty. Is the evidence admissible; if so, why?

A. The evidence is admissible. The rule prohibiting the reception of parol evidence varying or modifying a written agreement, does not apply where the original contract was verbal and entire and a part only was reduced to writing, nor does it apply to a collateral undertaking; these facts are always open to inquiry and may be proved by parol. Here the evidence was to prove a separate collateral agreement, a warranty, which is not contradicting the terms of the instrument. "If the fitness of the machine is implied, the guarantee is in harmony with it and adds nothing; if it is not implied, the paper contains no declaration that the machine shall be taken with all faults and insufficiencies, or at the defendant's risk. The parol evidence therefore contradicts no terms of the writing, nor varies it." *Chapin v. Dobson*, 78 N. Y. 74, followed in *Rontledge v. Worthington Co.*, 119 N. Y. 592; *Bagley Co. v. Saramac Co.*, 135 N. Y. 626; *Cooper v. Payne*, 186 N. Y. 334; *Vaughn Co. v. Lighthouse*, 64 App. Div. 138.

Q. A sold to B his entire stock and also the good will of the store. A bill of sale was executed, and at the time the same was signed A orally agreed not to open or be engaged in the same business in the same neighborhood. Thereafter A opened the same kind of business and B brought action against him. On the trial he offers to prove the oral agreement that A was not to open a store in the same neighborhood. A's attorney objects. How should the court rule?

A. The objection should be sustained, as this evidence would tend to vary or contradict the terms of the written bill of sale. If the purchaser desires to be protected he must expressly have it so stated in the written bill of sale. *Costello v. Eddy*, 34 State Rep. 565, *aff'd* in 128 N. Y. 650; *Doolittle v. Fitchett*, 35 Misc. 531; *Love v. Hamel*, 59 App. Div. 360.

Q. In an action against B by A, a certain contract entered into between B and C became relevant. At the trial A offered to introduce certain oral testimony contradicting the written contract between B and C. B objects. How should the court rule?

A. The testimony should be allowed as the action is between A and B, and the contract was between B and C. The rule that parol evidence shall not be permitted to vary or contradict the terms of a written contract, applies only in controversies between the parties to the instrument. *Folinsbee v. Sawyer*, 157 N. Y. 196; *City Trust Co. v. Amer. Brew. Co.*, 70 App. Div. 514; *Amer. Ice Co. v. Mickel*, 109 App. Div. 96; *Elec. Con. Co. v. Herman*, 67 Misc. 396.

Q. On the trial of a larceny, B is called as a witness. Upon cross-examination B is asked if he has ever been convicted of burglary. He answers that he has not. How may the district attorney contradict him, if at all? Give the general rule.

A. B can be contradicted either by cross-examination or by the record. The question in this case is fully answered by sec. 832 of the Code of Civ. Pro., which is as follows: "A person

who has been convicted of a crime or misdemeanor is, notwithstanding, a competent witness in a civil or criminal action or special proceeding; but the conviction may be proved for the purpose of affecting the weight of his testimony, either by the record, or by his cross-examination, upon which he must answer any question relevant to that inquiry; and the party cross-examining him is not concluded by his answer to such a question."

Q. A, who is a witness upon a certain trial is asked on cross-examination whether he has ever been arrested for larceny. The question is objected to. What should be the ruling of the court?

A. The objection should be sustained. The question was improper as the arrest was consistent with innocence; it is only allowable in impeaching the credibility of witnesses on cross-examination to prove their conviction of a crime. *People v. Gay*, 7 N. Y. 378; *People v. Brown*, 72 N. Y. 571; *People v. Crapo*, 76 N. Y. 288.

(NOTE.) A witness or a party defendant in a civil or criminal action cannot be asked on cross-examination whether he has been indicted, for an indictment is merely an accusation and no evidence of guilt. He cannot be asked if he was tried for a crime, unless it appears that he was convicted, because trial followed by acquittal is but an accusation successively met, and does not tend to discredit a witness and is incompetent for that purpose. *Ryan v. People*, 79 N. Y. 594; *People v. Noehlke*, 94 N. Y. 137; *Van Bokkelin v. Berdell*, 130 N. Y. 141; *People v. Cascome*, 185 N. Y. 317; *People v. Morrison*, 194 N. Y. 175.

Q. A, a witness, upon the trial of an action brought by B against C, is asked by B's attorney whether he has been in state's prison. The question is objected to. Is the objection good?

A. The objection should be overruled. Being in a state's prison presupposes a conviction of a crime, and therefore the question is admissible in order to impeach the credibility of the witness. *Real v. People*, 42 N. Y. 270; *People v. Weiss*, 129 App. Div. 672.

Q. A, who is on trial for bribery, takes the stand as a witness in his own behalf and is asked by the district attorney on cross-examination, if it is not a fact that he has been convicted of the crime of abortion some years before and sentenced to a term in prison. A answers denying any conviction. The district attorney is permitted, over A's attorney's objection, to introduce in evidence the record of his conviction of the crime which conviction has been reversed by the Court of Appeals. Was the ruling proper?

A. No. The reversal of a judgment places the parties where they were before the commencement of the action. *People v. McLaughlin*, 150 N. Y. 376. A reversal of a judgment of conviction absolutely nullifies it, and places the accused in the position where he was before the trial, clothed with the presumption of innocence. "The judgment having been reversed there was no conviction against him and he was justified in answering as he did, that he had never been convicted of a crime. It was error for the court to allow the district attorney to show that the accused at one time had been illegally and wrongfully convicted of crime. This former conviction could not have been proved in the ordinary way by introducing in evidence a certificate of conviction of defendant. The clerk of the court could have issued no such certificate because of the fact that the conviction had been annulled." *People v. Van Zile*, 80 Misc. 329.

(NOTE.) A pardon would not obliterate the record of conviction or blot out the fact that he has been convicted, therefore in such a case it is proper to prove conviction even though defendant was pardoned. *People v. Carlesi*, 154 App. Div. 481.

Q. A is on trial for assaulting B. The district attorney on cross-examination asks him if he had not assaulted C about six months before. A's attorney objects to the question. How should the court rule?

A. The objection should be overruled as the question was proper. Facts were asked for here, not accusation or irresponsible charges. Questions as to specific acts which tend to dis-

credit the witness or impeach his moral character may be asked on cross-examination. *People v. Casey*, 72 N. Y. 393; *People v. Irving*, 95 N. Y. 541; *People v. McCormick*, 135 N. Y. 663; *People v. Webster*, 139 N. Y. 73; *People v. Nelson*, 145 App. Div. 680.

Q. A is on trial for murder. He takes the stand as a witness in his own behalf. The district attorney asks him if he did not commit burglary three years before in the house of M. A answered No. The district attorney then began to prove by other witnesses that A had committed the burglary which he denied having committed. A's attorney objects to this. The court overrules his objection. Is the ruling sustainable on appeal?

A. The ruling cannot be sustained on appeal. This evidence is inadmissible because the cross-examination as to the burglary of M's house was collateral, and it is familiar law that the people are bound by the answers of a defendant given on cross-examination, and they cannot afterwards call witnesses to contradict him in reference to such answers. *People v. Ware*, 29 Hun, 473, *aff'd* in 92 N. Y. 653; *People v. Greenwall*, 108 N. Y. 296; *People v. De Garmo*, 179 N. Y. 130; *People v. Leonardo*, 199 N. Y. 441.

Q. A was on trial for murder. B was called as a witness in his (A's) behalf and gave material testimony. On cross-examination the district attorney asked him if he had not stolen several articles from his employer, C. B denies the accusation. The district attorney is then permitted to prove by C that B's answers were untrue. A's attorney excepts. What should the ruling be on appeal?

A. The judgment should be reversed. "This was error. Upon cross-examination the prosecution had the right, for the purpose of impairing the credit of the witness, to ask questions as to those collateral matters, but having asked and obtained answers, must abide by the answers given; other witnesses could not be called to prove such answers untrue." Stokes

v. People, 53 N. Y. 175. See also Potter v. Browne, 197 N. Y. 293; People v. Murphy, 135 N. Y. 450.

Q. A tells B's attorney that he saw C sign a certain deed on a certain day. Subsequently on the trial of an action of B against C, it becomes material to prove that C signed the deed. A is called as a witness and testifies that the deed was signed on that day but by D. B's attorney thereupon asks A, whether he did not previous to the trial tell him, the attorney, that C had signed the deed. The question was objected to on the ground that he was impeaching the credibility of his own witness. What should be the ruling of the court? State your reasons.

A. The objection should be overruled. "The further question has frequently arisen whether the party calling the witness should, upon being taken by surprise by unexpected testimony, be permitted to interrogate the witness in respect to his own previous declarations inconsistent with his evidence. We are of opinion that such questions may be asked of the witness for the purpose of proving his recollection, recalling to his mind the statements he has previously made, and drawing out an explanation of his apparent inconsistencies. This course of the examination may result in satisfying the witness that he has fallen into error, and that his original statements were correct, and it is calculated to elicit the truth. It is also proper for the purpose of showing the circumstances which induced the party to call him. Though the answers of the witness may involve him in contradictions calculated to impair his credibility, that is not a sufficient reason for excluding the inquiry. Proof by other witnesses that his statements are incorrect would have the same effect, yet the admissibility of such proof cannot be questioned. It is only evidence offered for the mere purpose of impeaching the credibility of the witness which is inadmissible when offered by the party calling him. Inquiries calculated to elicit the facts, or to show to the witness that he is mistaken, and to induce him to correct his evidence, should not be excluded simply because they may result unfavorably to his credi-

bility. In case he should deny having made previous statements inconsistent with his testimony, we do not think it would be proper to allow such statements to be proved by other witnesses, but where the questions to such statement are confined to the witness himself, we think they are admissible." *Rapallo, J.*, in *Bullard v. Pearsall*, 53 N. Y. 230. See also *People v. Kelly*, 113 N. Y. 647; *Vollkommer v. Cody*, 177 N. Y. 129.

Q. On the trial of an action to recover damages for personal injuries, A was called as a witness by the plaintiff to prove a material fact. A answered different to that which he told the plaintiff's attorney. The plaintiff then called B as a witness to prove that which A testified to was different. This was objected to on the ground that plaintiff was impeaching his own witness. How should the court rule?

A. The evidence shall be admitted. A party may contradict his own witness as to a fact material to the cause of action although the effect of such contradictory evidence may be to discredit the witness. *Coulter v. Amer. Ex. Co.*, 56 N. Y. 585; *Hunter v. Wetsell*, 84 N. Y. 549. "All the cases concur in the right of a party to contradict his own witness to prove a fact material to the issue to be otherwise than as sworn to by him, even when the necessary effect is to impeach him." *Becker v. Koch*, 104 N. Y. 403.

Q. On the trial of an action of A against B, B calls A as a witness and A gives testimony as to material facts. B being dissatisfied with the effect of A's testimony calls C, who testifies contrary to A as to the fact. Objection is made by A's attorney. What should the ruling be?

A. Objection should be overruled. "A party to an action, by calling the opposite party as a witness does not become bound by his testimony, but may dispute specific facts so testified to, although not permitted to impeach the character of the witness for truth." *Cross v. Cross*, 108 N. Y. 628. "The plaintiff urges on this appeal that the defendant having made her his own witness he is bound by her testimony, under the

rule that a party may not impeach his own witness. But there is a difference between introducing evidence to establish a particular fact contrary to that testified to by a party's witness and evidence introduced to impeach a witness, and we are persuaded under the law the defendant had a right to contradict the plaintiff in regard to the material facts in this case, although he has weakened his case by bringing out the evidence of the plaintiff under his assurance that she was worthy of belief." *Ruhl v. Heintze*, 97 App. Div. 442.

(NOTE.) The general rule is that an opponent's witness may be impeached by evidence from other persons of his bad general reputation in his own neighborhood. The witnesses for the purpose of impeachment must of course come from this neighborhood and may be asked whether they know the witness's general reputation in that community, and if they do, then what that reputation is, and if they say it is bad, then whether they would believe the witness on his oath. *Greenleaf on Ev.*, sec. 461; *Chase's Stephen's Dig. on Ev.* 133; *Carlson v. Winterson*, 147 N. Y. 652; *Dollner v. Lintz*, 84 N. Y. 669; *People v. Mather*, 4 Wend. 229. The rule also applies to parties to actions in civil or criminal cases, becoming witnesses. *Foster v. Newbrough*, 58 N. Y. 481; *People v. Greenwall*, 108 N. Y. 296.

Q. A sues B. On the trial of the case, C, a witness for B, testifies to a material fact. D, a witness for A, is in court, and will swear that in a conversation with him C stated the fact to be entirely different from the evidence he has given. A's attorney says nothing to C, but calls D as a witness for A in rebuttal to disprove C's testimony. B's attorney objects. What should be the ruling and why?

A. The objection should be sustained. A's attorney should have laid a foundation for the introduction of the contradictory evidence, so as to give the witness an opportunity to deny having made such statements in the conversation or to explain the alleged inconsistency. As A's attorney made no attempt to lay such a foundation, the evidence offered to show the contradiction was not admissible. The attention of the witness must be called to the place or time or other identifying circumstances of the conversation in which it is claimed he made statements inconsistent with his present testimony

before evidence will be received to impeach his credibility by showing that he actually made contradictory statements on the same subject. *Pendleton v. Empire Co.*, 19 N. Y. 13; *Hart v. Bridge Co.*, 84 N. Y. 56; *People v. Weldon*, 111 N. Y. 569; *Loughlin v. Brassil*, 187 N. Y. 128. If the witness after his attention has been properly called, denies having made the statement or does not remember making it, then other witnesses may be called to contradict him. *Palmeri v. R. R.*, 39 State Rep. 23; *Kelly v. Cohoes Co.*, 8 App. Div. 156.

Q. On the trial of an action wherein the defendant testified in his own behalf, plaintiff offered to prove by C certain statements of material facts contradictory to the evidence given by him on the trial, without first having inquired of him on the witness stand, whether or no he had made such statements, and on that ground the defendant's attorney objected to the evidence offered. How did the court rule, and why?

A. The evidence should be admitted. "The rule which makes it incumbent upon the cross-examining counsel first to direct the witnesses' attention with reasonable precision to, and interrogate him respecting an alleged contradictory statement before the latter may be given in evidence does not apply to parties to the action; and as to them the alleged contradictory statement is admissible as a declaration against interest." *Cook v. Barr*, 44 N. Y. 156; *Wright v. Nostrand*, 94 N. Y. 32; *Fisher v. Monroe*, 2 Misc. 327. "A party's statement out of court relevant to the issues is original evidence as an admission, and may be proved without previous interrogation of the witness." *Boyd v. Boyd*, 9 Misc. 161.

Q. On the trial of A for murder, B, a witness, testifies on cross-examination that on the day of the homicide he made a statement in writing to the chief of police and signed the same. After A's counsel rested his case the written statement of B was offered in evidence by the district attorney. A's attorney objects. How should the court rule?

A. The statement should be excluded as the paper was not shown to the witness and he had no opportunity to examine it. "It is competent for a party on the trial to prove that a witness, on the part of his adversary, has made oral statements inconsistent with evidence upon a material question given by such witness on the trial, for the purpose of impeaching the credibility of a witness, and weakening the force of the evidence. But it is requisite that the party offering the impeaching evidence should first call the attention of the witness to the circumstances under which the statements were made, that he may have an opportunity of correcting the evidence given on the trial or of explaining the apparent inconsistency between his evidence and his former statements. The reason of the rule applies as strongly to written as to oral statements made by the witness; and when his evidence is sought to be impeached by written statements, alleged to have been made by him, the writing should be first produced, so that he may have an opportunity for inspection and examination. And as the writing is the best evidence of the statement made by the witness therein, questions as to the contents are not ordinarily admissible." *Gaffney v. People*, 50 N. Y. 423. After the writing has been read in evidence, the witness may be examined in reference to its statements. "When the writing so proven is offered in evidence the court should admit it in whole or in such parts as its purpose of discrediting the witness requires or justifies, and it is a firmly established rule of this state that it cannot be read to the jury or, provided it can be produced used as a basis for a cross-examination as to its contents until it is in evidence." *Larkin v. R. R.*, 205 N. Y. 270.

Q. A and B have some difficulty and call on C, an attorney, and by his advice effect a settlement. A subsequently sues B for failure to keep and perform his contract of settlement. A subpoenas the attorney, C, for the purpose of showing the terms of the agreement. The attorney refuses to answer on the ground that he is prohibited from disclosing a professional communication. Is the testimony of the witness privileged?

A. No. "All communications made by a client to his counsel with a view to professional advice or assistance are privileged, whether such advice relates to a proceeding or suit pending or contemplated, or any other matter proper for such advice or aid; but communications made in the presence of all parties to the controversy are not privileged." *Britton v. Lorenz*, 45 N. Y. 51. "The provisions of sec. 835 of Code of Civ. Pro., prohibiting an attorney from disclosing professional communications made to him by his client does not apply, as between the parties, to communications made by two or more persons in consultation with an attorney for their mutual benefit; it cannot be invoked in any litigation which may thereafter arise between such persons." *Hurlbert v. Hurlbert*, 128 N. Y. 420.

(NOTE.) Section 835 of the Code of Civ. Pro., relating to privileged communications, provides as follows: "An attorney or counselor-at-law shall not be allowed to disclose a communication made by his client to him, or his advice given thereupon, in the course of his professional employment, nor shall any clerk, stenographer or any other person employed by such attorney or counselor be allowed to disclose any such communication or advice given thereon."

Q. A, the wife of B, having died under circumstances pointing to poisoning, B becoming alarmed by various newspaper comments and charges directed against him, goes to see a lawyer, taking C, his friend, with him. B has a long conversation with the lawyer in C's presence. Thereafter B is indicted and tried for the murder of his wife. At the trial the district attorney calls C as a witness and although B's attorney objects, C is allowed to testify to the conversations had in his presence. B's attorney excepts. What should be the ruling on appeal?

A. The judgment should be affirmed. There was no error in admitting the testimony. "The protection extended by the Statute (Code of Civ. Pro., sec. 835), to communications between attorney and client does not cover communications made to a friend, or to an attorney in the presence of a friend. Communications between counsel and clients are, as between themselves, protected from disclosure; but if heard by another,

in whose presence they are made, the confidential character is gone. (*Jackson v. French*, 3 Wend. 337.) The reason is obvious. A communication intended to be confidential should not be made in the hearing of a third person; unless that person stood in a peculiar relation of confidence. The protection extended by statute to communications between attorney and client is intended to cover those which the relation calls for and are supposed to be confided to the lawyer, to guide him in giving his professional aid and advice. I am not aware of any extension of the rule, which would protect the revelation of confidences made to a friend, or to a lawyer in the presence of a friend." Gray, J., in *People v. Buchanan*, 145 N. Y. 1.

Q. A acted as attorney for B and C in the preparation of an agreement concerning their mutual claims. Before the contract was signed, it was read and discussed in the presence of D, who with A witnessed its execution. Then A at B's direction delivered the contract to C. B dies shortly thereafter. In an action between B's administrators and C, A is called as a witness to testify to communications made to him by B and the advice given by him to B in the transaction. Objection is made to the testimony. How should the court rule?

A. The testimony should be admitted. "The veil of strict secrecy is thrown over communications between attorney and client, when they are, presumably, of a confidential character, but if the evidence discloses that the circumstances surrounding the transaction were such as not to warrant the presumption that the communications were in confidence, the Code provision is inapplicable. The rule of immunity as to communications between persons sustaining the relation of attorney and clients was not intended to operate where two or more persons are present, or are cognizant of the attorney's professional work. They are not then confidential. (*Whiting v. Barney*, 30 N. Y. 330; *Rosseau v. Bleau*, 131 N. Y. 177.) The reason of the rule is in the necessity of secrecy, in order that persons needing professional advice, shall be encouraged

to disclose freely and without fear, the facts upon which that advice shall be given. Where it appears to the court from the facts that the attorney is acting for two clients, as here, and the communications are as to the preparation of an agreement with respect to their mutual claims and as to its execution after the terms are assented to, the rule ceases to have any reasonable application." *Doheny v. Lacy*, 168 N. Y. 213.

(NOTE.) "Section 835 of the Code was enacted for the protection of the client and his property interests and does not authorize an attorney to refuse to disclose information imparted to him in his professional capacity by a client now deceased, when such information does not tend to disgrace the client's memory, and will be a benefit to his estate." *Matter of King v. Ashley*, 96 App. Div. 143.

Q. A contest has arisen over a will. It is alleged that undue influence has been used. The proponents offer to prove by the draftsman of the will, who is an attorney, the instructions received from the testator, and that they were carried out by the will. Is the evidence admissible?

A. Yes. "The draftsman of a will though he is an attorney, is not incompetent under sec. 835 of the Code of Civ. Pro. to testify in support of the will, to the instructions received from the testator in respect to the provisions to be incorporated in the will." *Matter of Chase*, 41 Hun, 203; *Matter of Austin*, 42 Hun, 516; *Matter of Barnes*, 70 App. Div. 528.

Q. A brings action to set aside a deed on the ground of fraud. At the trial, C, the widow of B (who is deceased), and who joined with B in executing the deed is called as a witness to testify as to certain conversations with B. Her testimony is objected to. Should it be admitted?

A. No. C was incompetent to testify under sec. 829 of the Code of Civ. Pro. which forbids persons interested in the event of an action to testify as to personal transactions or communications with the deceased. C was a person interested in the event of the action, so long as the deed stood she was estopped from setting up any right against anyone claiming

under it, but if the deed was set aside, she would be remitted to her right of dower. *Sanford v. Ellithorp*, 95 N. Y. 48.

Q. In proceedings for the probate of A's will which is contested on the alleged grounds of no due publication, B, who was a beneficiary under the will and who was present with the testator and the two witnesses when the will was executed, but took no part in the conversations between A and the witnesses, was called as a witness on behalf of the proponent of the will, and was asked to state what was done and said by A at the time the will was executed. The attorney for the contestant objects to this testimony. What should be the ruling of the surrogate?

A. The testimony should not be allowed. "B was under our decision an incompetent witness to testify to any conversations or transaction in his presence at the time of the execution and publication of the will. He was one of the chief beneficiaries thereunder, and was directly interested in establishing due execution. What occurred at that time was a transaction between the testatrix and the witness, within the meaning of sec. 829 of the Code, although he took no actual part in the conversation and it was wholly between the testatrix and the attesting witnesses. If active participation in the conversation was necessary to exclude an interested witness, and he should as an observer be permitted to testify to transactions in form between the deceased and third persons, although such transactions were in his interest, it would furnish an easy and convenient method in every case of evading the statute. The decisions have enforced the spirit of the statute by excluding such evidence, and have treated transactions between the deceased and third persons in the presence of interested parties as if the witness actually participated therein. (*Holcomb v. Holcomb*, 95 N. Y. 316; *Matter of Eysamen*, 113 N. Y. 62; *Matter of Dunham*, 121 N. Y. 575.)" *Andrews*, Ch. J., in *Matter of Bernsee*, 141 N. Y. 391.

Q. A borrowed \$10,000 of the Associated Bankers Corporation, and gave a 60 days' note therefor. Subsequently A died

and B duly qualified as executor of A's estate. The Bankers Corporation afterwards sued B, as executor, to recover the amount of the note. B pleaded payment, and on the trial gave testimony tending to prove the payment of the note by A to D who was the cashier and a vice-president of the Bankers Corporation. The Bankers Corporation then called D as a witness, and offers to prove by him that the note was not paid to him as claimed. This evidence was objected to on the ground that D was incompetent to testify because interested in the event of the action. What should be the ruling of the court?

A. The court should allow the testimony, as sec. 829 of the Code of Civ. Pro. expressly provides that a person shall not be deemed an interested party or person, or interested in the event by reason of his being an officer or stockholder in any banking corporation which is a party to an action.

Q. A, who is a witness on the trial of B for larceny, is asked by the district attorney, if he did not assist B, the defendant, in taking the goods. He refuses to answer the question. Can he be compelled to do so?

A. No, as he is privileged from answering questions which would tend to incriminate him. The rule is stated in sec. 837 of the Code of Civ. Pro., as follows: "A competent witness shall not be excused from answering a relevant question, on the ground only that the answer may tend to establish the fact that he owes a debt, or is otherwise subject to a civil suit. But this provision does not require a witness to give an answer, which will tend to accuse himself of a crime or misdemeanor, or to expose him to a penalty or forfeiture; nor does it vary any other rule, respecting the examination of a witness."

Q. A is on trial for murder. His attorney puts A's wife on the stand as a witness for him. The district attorney raises an objection as to her competency. The objection is sustained by the court, and the wife's evidence is excluded. A is

convicted and his attorney appeals on the ground that the court made an error in excluding the testimony of A's wife. Is the appeal good? State your reasons.

A. The appeal is good, for the wife was a competent witness under sec. 2445 of the Penal Law, which is as follows: "The husband or wife of a person indicted or accused of a crime is in all cases a competent witness, on the examination or trial of such person; but neither husband nor wife can be compelled to disclose a confidential communication, made by one to the other during their marriage." That the evidence of the husband or wife against the other is admissible, except of course as to confidential communication, see *People v. Petmecky*, 2 N. Y. Cr. Rep. 221, *aff'd* in 99 N. Y. 415; *People v. Fruck*, 170 N. Y. 204.

Q. A sues B, her husband, for an absolute divorce. On the trial, she takes the stand and attempts to testify as to his adultery. The husband's attorney objects. Is the objection good?

A. Yes, the objection should be sustained. Section 831 of the Code of Civ. Pro. provides as follows: "A husband or wife is not competent to testify against the other, upon the trial of an action, or the hearing upon the merit of a special proceeding, founded upon an allegation of adultery, except to prove the marriage or disprove the allegation of adultery. A husband or wife shall not be compelled, or without the consent of the other if living, allowed to disclose a confidential communication made by one to the other during marriage. In an action for criminal conversation, the plaintiff's wife is not a competent witness for the plaintiff, but she is a competent witness for the defendant, as to any matter in controversy; except that she cannot, without the plaintiff's consent, disclose any confidential communication had or made between herself and the plaintiff." See *O'Hara v. O'Hara*, 136 App. Div. 378; *Sheldon v. Sheldon*, 146 App. Div. 430; *Goldie v. Goldie*, 39 Misc. 389.

Q. A brings action against B to recover damages for the alienation of her (A's) husband's affections. On the trial the plaintiff offered in evidence certain statements made by her husband to her before and after the action was commenced to the effect that B had won his affections. Objection is made to this evidence as incompetent: What should be the ruling of the court?

A. The statements should not be admitted in evidence. Statements of the husband and wife are not admissible in an action for alienation of affections especially when made in the absence of the defendant, and when forming no part of any transaction had between the plaintiff and the defendant. The statements did not accompany any act but were merely declarations of opinion. They are not part of any *res gestæ*. *Manwarren v. Mason*, 79 Hun, 592; *Buchanan v. Foster*, 23 App. Div. 542.

Q. In an action upon a note against plaintiff's wife and another, the defendant pleaded a gift of the interest. The wife of the plaintiff was called as a witness by defendant and testified to a conversation with her husband when they were alone relating to and tending to establish an executed gift of the interest. This evidence was objected to on the ground that the conversation between the husband and wife was a confidential communication and prohibited by statute. How did the court rule and why?

A. The evidence should be admitted. "If the communications were sufficient to establish and execute a gift, they were material; and in any event they were business communications and not confidential, nor induced by the marital relation." *Grossman v. Luidanan*, 67 Misc. 438. "But this statute does not exclude all communications between husband and wife which are not had in the presence of third persons. It relates only to such as are expressly made in confidence, or such as spring out of and are induced by the marital relation, and are, therefore, confidential in character." *Sheldon v. Sheldon*, 146 App. Div. 432.

Q. A brings action for libel against a newspaper. The libelous articles charged illicit relations between A and B. At the trial the husband of A was called as a witness by defendant and asked if he had any dispute or conversation with A in relation to B. A's attorney objects. What should be the ruling of the court?

A. The evidence should be excluded as incompetent under sec. 831 of the Code of Civ. Pro., as it was a confidential communication between husband and wife. "The evidence offered could have no purpose useful to defendant unless it tended to show that during such a conversation with her husband she said or did, or omitted to say or do something, from which it might be inferred that there existed an unlawful intimacy between her and B. A conversation on such a subject between husband and wife seems to us to be clearly within the protection of the statute. . . . Its nature was not only confidential, but it was apparently induced by the marital relation for it cannot be conceived that such a topic would have been the subject of discussion but for the existence of such relation between the parties. Its nature and the relation of the parties forbade the thought of its being told to others and the law stamped it with that seal of confidence which the parties in such a situation would feel no occasion to exact." Parker, J., in *Warner v. Press Pub. Co.*, 132 N. Y. 181. See also *Parkhurst v. Berdell*, 110 N. Y. 386; *Millsbaugh v. Potter*, 62 App. Div. 521; *Norris v. Lee*, 136 App. Div. 685.

Q. In certain condemnation proceedings commenced by the city to take possession of certain lands, it becomes necessary for A to prove his title thereto. He offers an old deed to the land dated fifty years before, and also an old map showing that the land in question belonged to A. He proves that these papers were kept in the place where deeds are kept. The reception of these papers in evidence is objected to. What should the court do?

A. The deed and the map should be admitted in evidence as ancient documents. "In some cases a map might be receiv-

able in evidence as an ancient document, but it must purport upon its face to have been executed by competent authority and to have been found in the proper depository of such papers, or to have been made or referred to as a part of the muniments of title of the party in whose favor or against whom it is offered; or, where the maker is dead and it embraces large areas of territory, to have been so generally and publicly recognized to be correct as to afford safe grounds for the presumption that the lot owners in making the conveyances had in view the boundaries and monuments indicated upon it." *Donohue v. Whitney*, 133 N. Y. 178. See also *Cravath v. Baylis*, 113 App. Div. 666; *Miller v. State of N. Y.*, 68 Misc. 607.

Q. The X Corporation began an action against B to recover for certain work. B denied the allegation of the X Corporation and appeared and defended the action. On the trial C and D, president and secretary of the X Corporation, testified to the material facts in issue. There was no other evidence given, and the court instructed the jury to find for the X Corporation. B appeals on the ground that the court erred in directing a verdict for the plaintiff. Who wins on the appeal?

A. B wins. "The general rule is that where a witness is interested in the question, although he is not impeached or contradicted, his credibility is a question for the jury and the court is not warranted in directing a verdict upon his testimony alone. *Gildersleeve v. London*, 73 N. Y. 609; *Elwood v. W. U. Tel. Co.*, 45 N. Y. 549; *Kavanagh v. Wilson*, 70 N. Y. 177. The same rule applies to the testimony of two witnesses, both equally interested and testifying to the same facts." *Saranac R. R. v. Arnold*, 167 N. Y. 368. See also *Abramowitz v. Tenzer*, 144 App. Div. 172; *Hull v. Littauer*, 162 N. Y. 561.

Q. On the trial of an action in the supreme court of New York County, it becomes material to prove a statute of New York State, a municipal ordinance of the City of New York, a certain statute of Connecticut, and an act of Congress. Plaintiff's attorney asks the court to take judicial notice of all these. Will the court grant his request? If so, to what extent?

A. The New York statute will be taken judicial notice of. *Shaw v. Tobias*, 3 N. Y. 188. The municipal ordinance will not be taken notice of. *Porter v. Waring*, 69 N. Y. 250; *People ex rel. Cross Co. v. Ahearn*, 124 App. Div. 840; *City of N. Y. v. Seely Co.*, 149 App. Div. 104. The statute of Connecticut will not be taken notice of. *Monroe v. Douglas*, 5 N. Y. 447. As to proof of it see sec. 942 of the Code of Civ. Pro. The act of Congress will be taken notice of. *Kessel v. Abbetis*, 56 Barb. 362.

(NOTE.) The court can take judicial notice of nothing but facts authenticated by the public records. So population of a town or county will be judged by the last public records of same. *Adams v. Elwood*, 176 N. Y. 106. The court has taken judicial notice of "the present unfavorable state of the real estate market." *Moore v. Hatfield*, 71 Misc. 286. And so of all matters of common or public knowledge and general customs observed in the usual transaction of business, and banking, etc. *Bank v. Hall*, 83 N. Y. 338; *Hutchinson v. Manhattan Co.*, 150 N. Y. 250.

CANONS OF ETHICS ADOPTED BY THE NEW YORK STATE BAR ASSOCIATION AT ITS THIRTY-SECOND ANNUAL MEETING AT BUFFALO, JANUARY 28 AND 29, 1909, AND PRESENTED BY THE ASSOCIATION TO EACH PERSON ADMITTED TO THE BAR OF THIS STATE PURSUANT TO A RESOLUTION ADOPTED AT THE CONVENTION OF THE JUSTICES OF THE APPELLATE DIVISION HELD AT ALBANY, APRIL 1, 1910

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"There is certainly, without any exception, no profession in which so many temptations beset the path to swerve from the line of strict integrity, in which so many delicate and difficult questions of duty are continually arising. There are pitfalls and mantraps at every step, and the mere youth, at the very outset of his career, needs often the prudence and self-denial as well as the moral courage, which belong commonly to riper years. High moral principle is the only safe guide, the only torch to light his way amidst darkness and obstruction."—GEORGE SHARSWOOD.

"Craft is the vice, not the spirit, of the profession. Trick is professional prostitution. Falsehood is professional apostasy. The strength of a lawyer is in thorough knowledge of legal truth, in thorough devotion to legal right. Truth and integrity can do more in the profession than the subtlest and wiliest devices. The power of integrity is the rule; the power of fraud is the exception. Emulation and zeal lead lawyers astray; but the general law of the profession is duty, not success. In it, as elsewhere, in human life, the judgment of success is but the verdict of little minds. Professional duty, faithfully and well performed, is the lawyer's glory. This is equally true of the Bench and of the Bar."—EDWARD G. RYAN.

"Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser—in fees, expenses and waste of time. As a peacemaker, the lawyer has a superior opportunity of being a good man. Never stir up litigation. A worse man can scarcely be found than one who does this. Who can be more nearly a fiend than he who habitually overhauls the register of deeds in search of defects in titles, whereupon to stir up strife and put money in his pocket? A moral tone ought to be enforced in the profession which would drive such men out of it."—ABRAHAM LINCOLN.

CANONS OF ETHICS**I****Preamble**

In America, where the stability of Courts and of all departments of government rests upon the approval of the people, it is peculiarly essential that the system for establishing and dispensing Justice be developed to a high point of efficiency and so maintained that the public shall have absolute confidence in the integrity and impartiality of its administration. The future of the Republic, to a great extent, depends upon our maintenance of Justice pure and unsullied. It cannot be so maintained unless the conduct and the motives of the members of our profession are such as to merit the approval of all just men.

II**The Canon of Ethics**

No code or set of rules can be framed, which will particularize all the duties of the lawyer in the varying phases of litigation or in all the relations of professional life. The following canons of ethics are adopted by the New York State Bar Association as a general guide, yet the enumeration of particular duties should not be construed as a denial of the existence of others equally imperative, though not specifically mentioned.

1. The Duty of the Lawyer to the Courts.—It is the duty of the lawyer to maintain towards the Courts a respectful attitude, not for the sake of the temporary incumbent of the judicial office, but for the maintenance of its supreme importance. Judges, not being wholly free to defend themselves, are peculiarly entitled to receive the support of the Bar against unjust criticism and clamor. Whenever there is proper ground for serious complaint of a judicial officer, it is the right and duty of the lawyer to submit the grievances to the proper authorities. In such cases, but not otherwise, such charges should be encouraged and the person making them should be protected.

2. The Selection of Judges.—It is the duty of the Bar to endeavor to prevent political considerations from outweighing judicial fitness in the selection of Judges. It should protest earnestly and actively against the appointment or election of those who are unsuitable for the Bench; and it should strive to have elevated thereto only those willing to forego other employments, whether of a business, political or other character, which may embarrass their free and fair consideration of questions before them for decision. The aspiration of lawyers for judicial position should be governed by

an impartial estimate of their ability to add honor to the office and not by a desire for the distinction the position may bring to themselves.

3. Attempts to Exert Personal Influence on the Court.—Marked attention and unusual hospitality on the part of a lawyer to a Judge, uncalled for by the personal relations of the parties, subject both the Judge and the lawyer to misconstructions of motive and should be avoided. A lawyer should not communicate or argue privately with the Judge as to the merits of a pending cause, and he deserves rebuke and denunciation for any device or attempt to gain from a Judge special personal consideration or favor. A self-respecting independence in the discharge of professional duty, without denial or diminution of the courtesy and respect due the Judge's station, is the only proper foundation for cordial personal and official relations between Bench and Bar.

4. When Counsel for an Indigent Prisoner.—A lawyer assigned as counsel for an indigent prisoner ought not to ask to be excused for any trivial reason, and should always exert his best efforts in his behalf.

5. The Defense or Prosecution of Those Accused of Crime.—It is the right of the lawyer to undertake the defense of a person accused of crime, regardless of his personal opinion as to the guilt of the accused; otherwise innocent persons, victims only of suspicious circumstances, might be denied proper defense. Having undertaken such defense, the lawyer is bound by all fair and honorable means, to present every defense that the law of the land permits, to the end that no person may be deprived of life or liberty, but by due process of law.

The primary duty of a lawyer engaged in public prosecution is not to convict, but to see that justice is done. He should avoid oppression and injustice of any kind whatsoever. The suppression of facts or the secreting of witnesses capable of establishing the innocence of the accused is a public wrong.

6. Adverse Influences and Conflicting Interests.—It is the duty of a lawyer at the time of retainer to disclose to the client all the circumstances of his relations to the parties, and any interest in or connection with the controversy, which might influence the client in the selection of counsel.

It is unprofessional to represent conflicting interests, except by express consent of all concerned given after a full disclosure of the facts. Within the meaning of this canon, a lawyer represents conflicting interests when, in behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose.

The obligation to represent the client with undivided fidelity and not to divulge his secrets or confidences forbids also the subsequent acceptance of retainers or employment from others in matters adversely affecting any interest of the client with respect to which confidence has been reposed.

7. Professional Colleagues and Conflicts of Opinion.—A client's proffer of assistance of additional counsel should not be regarded as evidence of want of confidence, but the matter should be left to the determination of the client. A lawyer should decline association as colleague if it is objectionable to the original counsel, but if the lawyer first retained is relieved, another may come into the case.

When lawyers jointly associated in a cause cannot agree as to any matter vital to the interest of the client, the conflict of opinion should be frankly stated to him for his final determination. His decision should be accepted unless the nature of the difference makes it impracticable for the lawyer whose judgment has been overruled to co-operate effectively. In this event it is his duty to ask the client to relieve him.

Efforts, direct or indirect, in any way to encroach upon the business of another lawyer, are unworthy of those who should be brethren at the Bar; but, nevertheless, it is the right of any lawyer, without fear or favor, to give proper advice to those seeking relief against unfaithful or neglectful counsel, generally after communication with the lawyer of whom the complaint is made.

8. Advising Upon the Merits of a Client's Cause.—A lawyer should endeavor to obtain full knowledge of his client's cause before advising thereon, and he is bound to give a candid opinion of the merits and probable result of pending or contemplated litigation. The miscarriages to which justice is subject, by reason of surprises and disappointments in evidence and witnesses, and through mistakes of juries and errors of Courts, even though only occasional, admonish lawyers to beware of bold and confident assurances to clients, especially where the employment may depend upon such assurance. Whenever the controversy will admit of fair adjustment, the client should be advised to avoid or to end the litigation.

9. Negotiations With Opposite Party.—A lawyer should not in any way communicate upon the subject of controversy with a party represented by counsel; much less should he undertake to negotiate or compromise the matter with him, but should deal only with his counsel. It is incumbent upon the lawyer most particularly to avoid everything that may tend to mislead a party not represented by counsel, and he should not undertake to advise him as to the law.

10. Acquiring Interest in Litigation.—The lawyer should not purchase any interest in the subject-matter of the litigation which he is conducting.

11. Dealing With Trust Property.—Money of the client or other trust property coming into the possession of the lawyer should be reported promptly, and except with the client's knowledge and consent should not be commingled with his private property or be used by him.

12. Fixing the Amount of the Fee.—In fixing fees, lawyers should avoid charges which overestimate their advice and services, as well as those which undervalue them. A client's ability to pay cannot justify a charge in excess of the value of the service, though his poverty may require a less charge, or even none at all. The reasonable requests of brother lawyers, and of their widows and orphans without ample means, should receive special and kindly consideration.

In determining the amount of the fee, it is proper to consider: (1) the time and labor required, the novelty and difficulty of the questions involved and the skill requisite properly to conduct the cause; (2) whether the acceptance of employment in the particular case will preclude the lawyer's appearance for others in cases likely to arise out of the transaction, and in which there is a reasonable expectation that otherwise he would be employed, or will involve the loss of other business while employed in the particular case or antagonisms with other clients; (3) the customary charges of the Bar for similar services; (4) the amount involved in the controversy and the benefits resulting to the client from the services; (5) the contingency or the certainty of the compensation; and (6) the character of the employment, whether casual or for an established and constant client. No one of these considerations in itself is controlling. They are mere guides in ascertaining the real value of the service.

In fixing fees it should never be forgotten that the profession is a branch of the administration of justice and not a mere money-getting trade.

13. Contingent Fees.—Contingent fees, where sanctioned by law, should be under the supervision of the Court in order that clients may be protected from unjust charges.

14. Suing a Client for a Fee.—Controversies with clients concerning compensation are to be avoided by the lawyer so far as shall be compatible with his self-respect and with his right to receive reasonable recompense for his services; and lawsuits with clients should be resorted to only to prevent injustice, imposition or fraud.

15. How Far a Lawyer May Go in Supporting a Client's Cause.—Nothing operates more certainly to create or to foster popular prejudice against lawyers as a class, and to deprive the profession of that full measure of public esteem and confidence which belongs to the proper discharge of its duties than does the false claim, often set up by the unscrupulous in defense of questionable transactions, that it is the duty of the lawyer to do whatever may enable him to succeed in winning his client's cause.

It is improper for a lawyer to assert in argument his personal belief in his client's innocence or in the justice of his cause.

The lawyer owes "entire devotion to the interest of the client, warm zeal in the maintenance and defense of his rights and the exertion of his utmost learning and ability," to the end that nothing be taken or be withheld from

him, save by the rules of law, legally applied. No fear of judicial disfavor or public unpopularity should restrain him from the full discharge of his duty. In the judicial forum the client is entitled to the benefit of any and every remedy and defense that is authorized by the law of the land, and he may expect his lawyer to assert every such remedy or defense. But it is steadfastly to be borne in mind that the great trust of the lawyer is to be performed within and not without the bounds of the law. The office of attorney does not permit, much less does it demand of him for any client, violation of law or any manner of fraud or chicane. He must obey his own conscience and not that of his client.

16. Restraining Clients from Improperities.—A lawyer should use his best efforts to restrain and to prevent his clients from doing those things which the lawyer himself ought not to do, particularly with reference to their conduct towards Courts, judicial officers, jurors, witnesses and suitors. If a client persists in such wrongdoing the lawyer should terminate their relation.

17. Ill Feeling and Personalities Between Advocates.—Clients, not lawyers, are the litigants. Whatever may be the ill-feeling existing between clients, it should not be allowed to influence counsel in their conduct and demeanor toward each other or toward suitors in the case. All personalities between counsel should be scrupulously avoided. In the trial of a cause it is indecent to allude to the personal history or the personal peculiarities and idiosyncrasies of counsel on the other side. Personal colloquies between counsel which cause delay and promote unseemly wrangling should also be carefully avoided.

18. Treatment of Witnesses and Litigants.—A lawyer should always treat adverse witnesses and suitors with fairness and due consideration, and he should never minister to the malevolence or prejudices of a client in the trial or conduct of a cause. The client cannot be made the keeper of the lawyer's conscience in professional matters. He has no right to demand that his counsel shall abuse the opposite party or indulge in offensive personalities. Improper speech is not excusable on the ground that it is what the client would say if speaking in his own behalf.

19. Appearance of Lawyer as Witness for His Client.—When a lawyer is a witness for his client, except as to merely formal matters, such as the attestation or custody of an instrument and the like, he should leave the trial of the case to other counsel. Except when essential to the ends of justice, a lawyer should avoid testifying in Court in behalf of his client.

20. Newspaper Discussion of Pending Litigation.—Newspaper publications by a lawyer as to pending or anticipated litigation may interfere with a fair trial in the Courts and otherwise prejudice the due administration of justice. Generally they are to be condemned. If the extreme circumstances

of a particular case justify a statement to the public, it is unprofessional to make it anonymously. An *ex parte* reference to the facts should not go beyond quotation from the records and papers on file in the Court; but even in extreme cases it is better to avoid any *ex parte* statement.

21. Punctuality and Expedition.—It is the duty of the lawyer not only to his client, but also to the Courts and to the public to be punctual in attendance, and to be concise and direct in the trial and disposition of causes.

22. Candor and Fairness.—The conduct of the lawyer before the Court and with other lawyers should be characterized by candor and fairness.

It is unprofessional and dishonorable for the lawyer knowingly to misquote the contents of a paper, the testimony of a witness, the language or the argument of opposing counsel, or the language of a decision or a text-book; or with knowledge of its invalidity, to cite as authority a decision that has been overruled, or a statute that has been repealed; or in argument to assert as a fact that which has not been proved, or in those jurisdictions where a side has the opening and closing arguments to mislead his opponent by concealing or withholding positions in his opening argument upon which his side then intends to rely.

It is unprofessional and dishonorable to deal other than honestly with the facts in taking the statements of witnesses, in drawing affidavits and other documents, and in the presentation of causes.

A lawyer should not offer evidence, which he knows the Court should reject, in order to get the same before the jury by argument for its admissibility, nor should he address to the Judge arguments upon any point not properly calling for determination by him. Neither should he introduce into an argument, addressed to the Court, remarks or statements intended to influence the jury or bystanders.

These and all kindred practices are unprofessional and unworthy of an officer of the law charged, as is the lawyer, with the duty of aiding in the administration of justice.

23. Attitude Toward Jury.—All attempts to curry favor with juries by fawning, flattery or pretended solicitude for their personal comfort are unprofessional. Suggestions of counsel, looking to the comfort or convenience of jurors, and propositions to dispense with argument, should be made to the Court out of the jury's hearing. A lawyer must never converse privately with jurors about the case; and both before and during the trial he should avoid communicating with them, even as to matters foreign to the cause.

24. Right of Lawyer to Control the Incidents of the Trial.—As to incidental matters pending the trial, not affecting the merits of the cause, or working substantial prejudice to the rights of the client, such as forcing the opposite lawyer to trial when he is under affliction or bereavement; forcing

the trial on a particular day to the injury of the opposite lawyer when no harm will result from a trial at a different time; agreeing to an extension of time for signing a bill of exceptions, cross interrogatories and the like, the lawyer must be allowed to judge. In such matters no client has a right to demand that his counsel shall be illiberal, or that he do anything therein repugnant to his own sense of honor and propriety.

25. Taking Technical Advantage of Opposite Counsel; Agreements With Him.—A lawyer should not ignore known customs or practice of the Bar or of a particular Court, even when the law permits, without giving timely notice to the opposing counsel. As far as possible, important agreements, affecting the rights of clients, should be reduced to writing; but it is dishonorable to avoid performance of an agreement fairly made because it is not reduced to writing, as required by rules of Court.

26. Professional Advocacy Other Than Before Courts.—A lawyer openly, and in his true character may render professional services before legislative or other bodies, regarding proposed legislation and in advocacy of claims before departments of government, upon the same principles of ethics which justify his appearance before the Courts; but it is unprofessional for a lawyer so engaged to conceal his attorneyship, or to employ secret personal solicitations, or to use means other than those addressed to the reason and understanding to influence action.

27. Advertising, Direct or Indirect.—The most worthy and effective advertisement possible, even for a young lawyer, and especially with his brother lawyers, is the establishment of a well-merited reputation for professional capacity and fidelity to trust. This cannot be forced, but must be the outcome of character and conduct. The publication or circulation of ordinary simple business cards, being a matter of personal taste or local custom, and sometimes of convenience, is not *per se* improper. But solicitation of business by circulars or advertisements, or by systematic personal canvassing is unprofessional. It is equally unprofessional to procure business by indirection through touters of any kind, whether allied real estate firms or trust companies advertising to secure the drawing of deeds or wills or offering retainers in exchange for executorships or trusteeships to be influenced by the lawyer. Indirect advertisement for business by furnishing or inspiring newspaper comments concerning causes in which the lawyer has been or is engaged, or concerning the manner of their conduct, the magnitude of the interests involved, the importance of the lawyer's positions, and all other like self-laudation, defy the traditions and lower the tone of our high calling, and are intolerable.

28. Stirring up Litigation, Directly or Through Agents.—It is unprofessional for a lawyer to volunteer advice to bring a lawsuit, except in rare cases where ties of blood, relationship or trust make it his duty to do so.

Stirring up strife and litigation is not only unprofessional, but it is indictable at common law. It is disreputable to hunt up defects in titles or other causes of action and inform thereof in order to be employed to bring suit, or to breed litigation by seeking out those with claims for personal injuries or those having any other grounds of action in order to secure them as clients, or to employ agents or runners for like purposes, or to pay or reward, directly or indirectly, those who bring or influence the bringing of such cases to his office, or to remunerate policemen, court or prison officials, physicians, hospital *attachés* or others who may succeed, under the guise of giving disinterested friendly advice, in influencing the criminal, the sick and the injured, the ignorant or others, to seek his professional services. A duty to the public and to the profession devolves upon every member of the Bar, having knowledge of barratrous practices upon the part of any practitioner, immediately to inform thereof to the end that the offender may be disbarred.

29. Upholding the Honor of the Profession.—Lawyers should expose without fear or favor before the proper tribunals corrupt or dishonest conduct in the profession, and should accept without hesitation employment against a member of the Bar who has wronged his client. The counsel upon the trial of a cause in which perjury has been committed owe it to the profession and to the public to bring the matter to the knowledge of the prosecuting authorities. The lawyer should aid in guarding the Bar against the admission to the profession of candidates unfit or unqualified because deficient in either moral character or education. He should strive at all times to uphold the honor and to maintain the dignity of the profession and to improve not only the law but the administration of justice.

30. Justifiable and Unjustifiable Litigations.—The lawyer must decline to conduct a civil cause or to make a defense when convinced that it is intended merely to harass or to injure the opposite party or to work oppression or wrong. But otherwise it is his right, and, having accepted retainer, it becomes his duty to insist upon the judgment of the Court as to the legal merits of his client's claim. His appearance in Court should be deemed equivalent to an assertion on his honor that in his opinion his client's case is one proper for judicial determination.

31. Responsibility for Litigation.—No lawyer is obliged to act either as adviser or advocate for every person who may wish to become his client. He has the right to decline employment. Every lawyer upon his own responsibility must decide what business he will accept as counsel, what causes he will bring into Court for plaintiffs, what cases he will contest in Court for defendants. The responsibility for advising questionable transactions, for bringing questionable suits, for urging questionable defenses, is the lawyer's responsibility. He cannot escape it by urging as an excuse that he is only following his client's instructions.

32. The Lawyer's Duty in Its Last Analysis.—No client, corporate or individual, however powerful, nor any cause, civil or political, however important, is entitled to receive, nor should any lawyer render, any service or advice involving disloyalty to the law whose ministers we are, or disrespect of the judicial office, which we are bound to uphold, or corruption of any person or persons exercising a public office or private trust, or deception or betrayal of the public. When rendering any such improper service or advice, the lawyer invites and merits stern and just condemnation. Correspondingly, he advances the honor of his profession and the best interests of his client when he renders service or gives advice tending to impress upon the client and his undertaking exact compliance with the strictest principles of moral law. He must also observe and advise his client to observe the statute law, though until a statute shall have been construed and interpreted by competent adjudication, he is free and is entitled to advise as to its validity and as to what he conscientiously believes to be its just meaning and extent. But above all a lawyer will find his highest honor in a deserved reputation for fidelity to private trust and to public duty, as an honest man and as a patriotic and loyal citizen.

III

Oath of Admission

The general principles which should ever control the lawyer in the practice of his profession are clearly set forth in the following Oath of Admission to the Bar:

I DO SOLEMNLY SWEAR:

I will support the Constitution of the United States and the Constitution of the State of New York.

I will maintain the respect due to Courts of Justice and judicial officers;

I will not counsel or maintain any suit or proceeding which shall appear to me to be unjust, nor any defense except such as I believe to be honestly debatable under the law of the land.

I will employ for the purpose of maintaining the causes confided to me such means only as are consistent with truth and honor, and will never seek to mislead the Judge or jury by any artifice or false statement of fact or law;

I will maintain the confidence and preserve inviolate the secrets of my client, and will accept no compensation in connection with his business except from him or with his knowledge and approval;

I will abstain from all offensive personality, and advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which I am charged;

I will never reject, from any consideration personal to myself, the cause of the defenseless or oppressed, or delay any man's cause for lucre or malice.
SO HELP ME GOD.

